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Family Law

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FAMILY LAW

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* Professor of Law, University of Miami. The material surveyed extends from the cases reported in 283 So. 2d 102 through 316 So. 2d 1, and the legislation enacted by the 1974 and 1975 regular and special sessions of the Florida Legislature.

I. INTRODUCTION

The volume of family law litigation and legislation has continued to increase in spite of the enactment of a "no-fault" dissolution of marriage procedure; however, the emphasis has shifted from fault to the financial affairs of the parties with alimony, child support and property cases apparently accounting for most of the increase in the cases. Although no empirical study has been made by the author, it would appear that many trial courts have demonstrated a lack of proper discretion in applying the rehabilitative alimony concept to women whose advanced years, physical deterioration and general lack of employable skills preclude any realistic hope of rehabilitation. The pendulum may have swung too far from a former female-oriented divorce system to one which seems unduly male-oriented.

II. MARRIAGE

A marriage ceremony performed by an Orthodox Jewish rabbi in accordance with the rules and traditions of the Orthodox Jewish faith, but which is performed without a marriage license as required by chapter 714 of the Florida Statutes, is invalid.[1]

The former public policy of Florida supposedly favored a common law marriage when parties were married, became divorced and then resumed living together prior to the adoption of section 741.211 of the Florida Statutes which did away with the common-law marriage doctrine in Florida. It is not necessary to introduce testimony of witnesses who were present when the contract of marriage between the parties was made; the marriage may be proven by testimony of habit and repute in the community.[2]

III. DISSOLUTION OF MARRIAGE

A. *Jurisdiction*

The Supreme Court of Florida has held that Florida has a compelling state interest in requiring six months residence as a precondition to dissolution of marriage in order that Florida may avoid intrusion upon the rights and interests of sister states and to insure the integrity of its decrees as against future collateral attack in foreign courts. As a result, this residency requirement is not an unconstitutional infringement of the protected right to travel under the equal protection clause of the United States Constitution.[3] Florida's ruling is consistent with a subsequent ruling of the Supreme Court of the United States which held that Iowa's statute requiring one year residency for divorce neither unconstitutionally interferes with a person's right to travel nor violates the due process and equal protection clauses of the fourteenth amendment.[4]

At least one district court of appeal is of the view that a wife in Florida may acquire a domicile different from that of her husband prior to the separation of the parties so long as she has physically resided in this state. As a result, when the parties move to Florida the wife may adopt Florida as her domicile while the husband may consider his domicile to continue in a foreign state even though he is in Florida temporarily as a military serviceman. Furthermore, so

1. Litzky v. Ullman, 296 So. 2d 638 (Fla. 3d Dist. 1974).
2. Carter v. Carter, 309 So. 2d 625 (Fla. 3d Dist. 1975).
3. Caizza v. Caizza, 291 So. 2d 569 (Fla. 1974) *upholding* FLA. STAT. § 61.021 (1974).
4. Sosna v. Iowa, 419 U.S. 393 (1975).

long as the wife has resided in Florida for the requisite six month period, Florida has jurisdiction over her dissolution action even though she may have testified that she had not decided that she would permanently reside in Florida and that she would probably leave Florida after the dissolution of the marriage.[5]

Florida's residency requirement has been met when it is shown that a military serviceman moved to Florida with his parents when he was 4 years old; that he never resided out of Florida except during military service; that he frequently visited Florida while on furlough; that he had listed Florida as his place of residence with the Army and he testified that he always intended that his permanent residence be in Florida.[6]

The fact of the plaintiff's residence for a dissolution of marriage must be corroborated, and the admission by the adverse party of the fact of residence is not sufficient.[7]

When testimony shows that the husband could have found his wife's address by writing to one of his four children or to his own brother or sister, but instead used a ten year old address, and he admitted at the trial that he had not made any search or inquiry to discover if the address contained in his affidavit for constructive service was correct, his affidavit was held to be false "in that, not only did he not make a *diligent* search, he made no search."[8] Since the court lacked jurisdiction, the dissolution judgment was set aside.

This holding should be compared with the one in *The First National Bank of Clearwater v. Bourquin*[9] wherein the notice to appear had been mailed to the last known address of the wife and it was returned through apparent error of the postal service. The husband attempted to communicate with the wife's brother, her father and her daughter in an attempt to ascertain her current address. The court held that the husband had made an honest effort to determine the wife's address and that he was not required to make extraordinary efforts or to utilize all possible means in order to satisfy the diligent search and inquiry test.

If the circuit court in Palm Beach County should transfer a dissolution of marriage case to Collier County on the basis that

5. Bowers v. Bowers, 287 So. 2d 723 (Fla. 1st Dist. 1974).
6. Sheppard v. Sheppard, 286 So. 2d 37 (Fla. 1st Dist. 1974).
7. Wise v. Wise, 310 So. 2d 431 (Fla. 1st Dist. 1975).
8. Canzoniero v. Canzoniero, 305 So. 2d 801 (Fla. 4th Dist. 1975).
9. 310 So. 2d 310 (Fla. 1st Dist. 1975).

venue was in the latter county, the Palm Beach court may not, in the same order, reserve jurisdiction over the wife in contempt proceedings previously instituted by the husband.[10]

In actions for dissolution or annulment of marriages, adoption, and cases not requiring personal service of process, it is now permissible for insolvent and poverty-stricken plaintiffs to post notice of process instead of publication of process in a legal newspaper.[11]

If a foreign corporation is not a party to a dissolution proceeding, a court does not have the power to control (by the injunctive process) the activities of this corporation or its president even though he is a defendant in his personal capacity in the action. The court has the power to control the defendant in his individual capacity, but not in his official capacity.[12]

The residency requirements for a dissolution of marriage may not be established by the uncorroborated testimony of the petitioner.[13]

B. *"Irretrievably Broken Marriages"*

If the pleadings and evidence show that the marriage is "in fact ended because of the basic unsuitability of the spouses for each other and their state of mind toward their relationship"[14] it is error for the trial court to deny the dissolution and to attempt to effectuate a reconciliation of the parties.

A failure to contest an allegation that the marriage is irretrievably broken or a stipulation that it is so broken is not legally sufficient to justify a dissolution of the marriage. The trial court judge must make a finding upon the evidence which must show sufficient facts to justify a determination that the marriage is irretrievably broken, and if it is so found he must dissolve the marriage.[15]

A stipulation by the parties that their marriage is "irretrievably broken" is not a sufficient predicate upon which to base a judgment of dissolution, but rather the trial court must

> [h]old a full evidentiary hearing at which all of the surrounding facts and circumstances are to be inquired into so that the chan-

10. Kern v. Kern, 309 So. 2d 563 (Fla. 2d Dist. 1975).
11. Fla. Laws 1974, ch. 74-152, *amending* FLA. STAT. §§ 49.031, 49.10 & 49.12.
12. Donner v. Donner, 313 So. 2d 456 (Fla. 3d Dist. 1975).
13. Lemon v. Lemon, 314 So. 2d 623 (Fla. 2d Dist. 1975).
14. Carrigan v. Carrigan, 283 So. 2d 574 (Fla. 4th Dist. 1973).
15. Nelms v. Nelms, 285 So. 2d 50 (Fla. 4th Dist. 1973).

> cellor properly may arrive at a conclusion as to whether or not the marriage has reached the terminal stage based upon facts which must be shown.[16]

In a case of apparent first impression in the United States, a Florida district court has held that the parties to a dissolution of marriage proceeding are not entitled to exclude the public and the press merely because they request a closed hearing. Further, the press and the public have standing to maintain a prohibition proceeding for the purpose of gaining access to such a dissolution proceeding. The court was careful to articulate that it does have power to exclude the public for cogent reasons, but that the mere desire of the parties for secrecy was not enough.[17]

C. *Defenses*

The clean hands doctrine has been abolished in dissolution of marriage proceedings except for cases involving fraud and deceit;[18] therefore, it is reversible error for a trial court judge to refuse dissolution upon the basis that the complaining party has unclean hands.[19]

D. *Reservation of Jurisdiction and Nunc Pro Tunc Orders*

A trial court may properly enter an order of dissolution of marriage while reserving jurisdiction to determine issues regarding alimony, child custody and support at a later time pending further investigation; the court thus is not bound to decide all issues at once.[20]

A trial court judge who enters a "partial final judgment of dissolution of marriage"[21] and thereafter orally advises the attorneys of his final decision regarding all matters related thereto and asks them to prepare a final judgment may enter two nunc pro tunc judgments when the husband dies after the entering of the partial final judgment of dissolution but before the entry of the final judgment. The partial final judgment dissolved the marriage — not the death of the husband.

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16. Stafford v. Stafford, 294 So. 2d 25 (Fla. 3d Dist. 1974).

17. State *ex rel.* Gore Newspapers Co. v. Tyson, 313 So. 2d 777 (Fla. 4th Dist. 1975).

18. De La Portilla v. De La Portilla, 287 So. 2d 345 (Fla. 3d Dist. 1973), *rev'd on other grounds*, 304 So. 2d 116 (Fla. 1974).

19. Johnson v. Johnson, 284 So. 2d 231 (Fla. 2d Dist. 1973).

20. Klarish v. Klarish, 296 So. 2d 497 (Fla. 3d Dist. 1974).

21. Becker v. King, 307 So. 2d 855 (Fla. 4th Dist. 1975).

The nunc pro tunc vis-a-vis death concept made another appearance in *Baggett v. Baggett*.[22] A judgment of dissolution of marriage having been entered, the wife petitioned for a rehearing concerning alimony, etc., but she did not contest the entry of the dissolution judgment itself. The judge, upon rehearing, orally stated that the former husband should convey his interest in the marital home to the former wife as alimony. Later that same day and before the signing and entry of the written order, the former husband died. The former wife then asked the court to enter a nunc pro tunc order concerning the marital home, but the new wife of the former husband naturally contested this approach. The appellate court held that the trial court had the power to enter a nunc pro tunc order since the former husband fully participated in the hearing and the matter was ripe for determination.

E. *Appeals*

A trial court does not have jurisdiction to dispose of a dissolution of marriage case when an appeal has been properly perfected even though no supersedeas has been taken.[23]

A court may dismiss an appeal if the appellant has removed himself from the state and has failed to comply with orders of the trial court; however, if the removal may have been caused by a change in employment (college teaching) rather than an attempt to defeat jurisdiction, the court will defer the dismissal for a set period in order to permit the appellant to return to Florida or to state under oath that he will return within a reasonable period of time prior to oral argument of the appeal.[24]

F. *Collateral Attack*

Rule 1.540(b) of the Florida Rules of Civil Procedure provides that a final judgment may be set aside because of "mistake, inadvertence, surprise or excusable neglect"; however, a mistake of law is not grounds for setting aside a judgment. In *Kuykendal v. Kuykendal*[25] a proposed final decree of dissolution of marriage provided that an estate by the entirety in a fishing camp would become a tenancy in common. The attorney for the husband agreed to this

22. 309 So. 2d 223 (Fla. 2d Dist. 1975).
23. De La Portilla v. De La Portilla, 304 So. 2d 116 (Fla. 1974).
24. Salamon v. Salamon, 306 So. 2d 554 (Fla. 1st Dist. 1975).
25. 301 So. 2d 466 (Fla. 1st Dist. 1974).

wording, and the judgment was signed by the trial judge. Subsequently, the former husband asked for the judgment to be set aside on the grounds that he never intended for the fishing camp to be held as a tenancy in common; that he had paid for it out of his own funds and he did not realize until after the judgment that he would not have an opportunity at a later time to present evidence as to his ownership. The trial court set aside the judgment, but the District Court of Appeal, First District, reversed on the grounds that the former husband had every opportunity prior to the entry of the judgment to ascertain the law of Florida regarding the distribution of real property upon dissolution of a marriage.

When a former husband files a motion under Rule 1.540 F.R.C.P. to set aside his wife's divorce on the ground that the court lacked jurisdiction because she was a resident of Mexico rather than Florida and she does not directly attack the motion, she may not indirectly attack it by objecting to written requests for admissions dealing with her alleged residency in Mexico. These requests for admissions were duly related and relevant to his claim.[26]

If a former wife has her marriage to another annulled and then seeks to re-establish alimony from the first husband, he may collaterally attack the annulment in an effort to show that she is still married to the other "husband."[27]

Under Rule 1.540(b) of the Florida Rules of Civil Procedure a trial court should set aside a default and final judgment which are entered against a wife as a result of misrepresentations made to her by her husband which caused her not to contest the dissolution proceedings.[28]

The declaratory judgment procedure (as provided for in chapter 86 of the Florida Statutes) may not be used to determine the validity of a divorce judgment of a Florida court which was subsequently held to be invalid by a Massachusetts court.[29]

G. *Foreign Judgments*

When a foreign court reserves jurisdiction over the parties and the subject matter of a divorce action, the court has continuing in personam jurisdiction to modify the decree as to matters within the scope of the original decree. The foreign court, however, does not

26. Polonsky v. Polonsky, 303 So. 2d 64 (Fla. 4th Dist. 1974).
27. Gobelman v. Gobelman, 303 So. 2d 646 (Fla. 1st Dist. 1974).
28. Kern v. Kern, 291 So. 2d 210 (Fla. 4th Dist. 1974).
29. Thomas v. Thomas, 314 So. 2d 8 (Fla. 3d Dist. 1975).

have jurisdiction to order a former husband to pay $5,000 to repair the marital home in the foreign state when the original decree was silent as to any question regarding repair and maintenance of the home. As a result, this foreign decree would not be entitled to full faith and credit in Florida. Similarly, when the same decree orders the former husband to deposit $15,000 in a bank trust account to pay for alimony, etc., this does not relate to the payment of arrearages but to payment of future alimony and, since alimony may always be modified, neither is it entitled to full faith and credit in Florida.[30]

H. *Legislation*

The Florida Task Force on Marriage and the Family Unit was created and authorized by the legislature to study and to make recommendations dealing with the dissolution of marriage laws, child custody, child support, distribution of property between spouses, the laws relating to marriage, the causes of divorce, family discipline of children, etc. The magnificent sum of $5,000 was appropriated for the Task Force.[31]

IV. ALIMONY

A. *Jurisdiction*

When a wife has changed her domicile from Wyoming to Florida prior to the filing of a divorce suit by her husband in Wyoming, constructive service of process will not give the Wyoming court jurisdiction to adjudicate alimony and property rights. The Wyoming decree is not entitled to full faith and credit except insofar as it dissolves the marriage.[32]

Constructive service of process under section 48.193(1)(e) of the Florida Statutes against a nonresident husband in a suit asking for alimony, child support, attorney fees and costs is appropriate only when the husband has been a resident of Florida and is now a resident of another state or is a resident of Florida residing in a foreign state; in the absence of one of these requirements the service is void.[33]

In a dissolution action, a trial court judge is not required as a

30. West v. West, 301 So. 2d 823 (Fla. 2d Dist. 1974).
31. Fla. Laws 1975, ch. 75-164.
32. Storer v. Storer, 305 So. 2d 212 (Fla. 3d Dist. 1974).
33. Rosen v. Rosen, 306 So. 2d 546 (Fla. 3d Dist. 1974).

matter of law to reserve jurisdiction to award alimony in the future, and when a wife fails to appeal from a final judgment which does not reserve jurisdiction, the judgment becomes final. The trial court does not have jurisdiction to award alimony at a later date.[34] On the other hand, another court has held that a trial court should reserve jurisdiction to award periodic alimony in the future, in addition to a present award of lump-sum alimony payable in monthly installments when the effect of the lump-sum alimony award will leave the wife at age fifty without any support.[35] In a questionable decision, the District Court of Appeal, Second District, held that a trial court which fails to reserve jurisdiction in a dissolution judgment awarding rehabilitative alimony still has jurisdiction to change the rehabilitative alimony into permanent alimony, provided that the wife files her petition asking for this relief before the expiration of the period set for payment of rehabilitative alimony and provided further she shows that she has been unable to rehabilitate herself through no fault of her own.[36]

The Uniform Enforcement of Support Act (chapter 88 of the Florida Statutes) is designed to provide a remedy entirely separate from other legal remedies. Hence, when a wife filed suit for support under this Act, it was error for the trial court to dismiss the case on the basis that her husband had a dissolution of marriage case pending and it would be in the best interests of the parties to have all questions decided in the dissolution action.[37]

B. *Discovery*

It has been held that a trial court judge has the discretion to order the spouses to exchange copies of the first page of their federal income tax returns as part of the discovery process.[38] It is reversible error in a dissolution of marriage action for a trial court to refuse to require a husband to answer questions in a deposition dealing with his alleged adultery, because the husband's conduct could be a factor in influencing the court's award of alimony to the wife under section 61.08(2) of the Florida Statutes. Although a trial court judge

34. Elkins v. Elkins, 287 So. 2d 119 (Fla. 3d Dist. 1973).

35. Hyatt v. Hyatt, 315 So. 2d 11 (Fla. 3d Dist. 1975). Even though a court may be correct in denying alimony to a wife, the court should reserve jurisdiction in order to award alimony in the future because of a change of conditions. Weinman v. Weinman, 310 So. 2d 442 (Fla. 3d Dist. 1975).

36. Lee v. Lee, 309 So. 2d 26 (Fla. 2d Dist. 1975).

37. Wagner v. Wagner, 291 So. 2d 655 (Fla. 2d Dist. 1974).

38. Rogers v. Rogers, 297 So. 2d 853 (Fla. 4th Dist. 1974).

may refuse to consider the husband's adultery as affecting the award of alimony, he has no right to refuse to hear evidence dealing with the adultery.[39] On the other hand, it has been held in another district that a court is not bound to hear testimony concerning the husband's adultery when he is not claiming alimony; when the wife is claiming alimony, the award must be based upon her needs and the husband's ability to pay and his adultery would have no bearing on these issues.[40]

It has also been held to be improper for a new trial court judge to make his determination of a new alimony award based upon an appellate record submitted upon a prior appeal of the case, and the case must be remanded for the taking of additional testimony.[41]

C. *Criteria for the Award*

Section 61.08(2) of the Florida Statutes provides that "in determining a proper award of alimony, the court may consider any factor necessary to do equity and justice between the parties." The District Court of Appeal, Fourth District, has held that the marital conduct and misconduct of the parties is a factor to be considered by the trial court in awarding alimony and attorney's fees, and that the case law which developed under former section 61.08 "is equally applicable to the 1971 statute."[42]

Moreover, it is an abuse of discretion and reversible error for a chancellor to refuse to give a husband an opportunity to allege the adultery of the wife and to allow a hearing on this matter as a defense to the awarding of alimony and the amount thereof. The trial court may, however, after hearing evidence on the issue of adultery, choose to consider or exclude it in making the award.[43] It is to be wondered if this required hearing may well be arid formalism.

If a husband and wife each have substantially the same income, it is reversible error to award alimony to the wife.[44]

Section 61.08(2) of the Florida Statutes provides that the court may consider any factor in making an alimony award; therefore, it is not improper for a court to consider the fact that the husband was

39. Pro v. Pro, 300 So. 2d 288 (Fla. 4th Dist. 1974).
40. Escobar v. Escobar, 300 So. 2d 702 (Fla. 3d Dist. 1974).
41. Dash v. Dash, 306 So. 2d 543 (Fla. 3d Dist. 1975).
42. Oliver v. Oliver, 285 So. 2d 639 (Fla. 4th Dist. 1973).
43. Stafford v. Stafford, 294 So. 2d 25 (Fla. 3d Dist. 1974).
44. Roberts v. Roberts, 283 So. 2d 396, (Fla. 1st Dist. 1973).

guilty of overreaching in a real estate transaction with his wife.[45]

It would appear that even though a husband has submitted financial statements to banks in order to secure credit and his wife later uses these statements against him in dissolution proceedings, he may nonetheless show that "99% of the . . . financial statements indicate 'puffing' "[46] in order to show his true worth and income. There would seem to be a questionable moral standard implicit in this decision.

It is reversible error for a trial court to dismiss a wife's claim for alimony on the ground that she had initially refused to submit to a physical examination by a doctor to determine the validity of her assertion that she was unable to work when she subsequently agreed to submit to an examination. This particular sanction was excessive and it should not have gone beyond the point of barring her from introducing evidence that she was unable to work; the sanction should not be continued beyond that point when the wife agreed to submit to an examination.[47]

An award of alimony consisting of 30 per cent of the husband's gross income has been held to be improper when the husband's income has been relatively modest during his specialized medical training and the couple's standard of living was much higher than his income because of support furnished by the wife's parents. The alimony should have been based upon the standard of living which they could have maintained without contribution from the wife's parents.[48]

D. *Duration of an Award*

A court should specify whether alimony is either permanent or rehabilitative as well as whether a husband's obligation to pay mortgage payments (as required in the judgment) is either alimony or child support.[49]

The question of the duration of an award of alimony has been dramatically affected by the case of *First National Bank of St. Petersburg v. Ford*.[50] In *Ford* a trial court judge awarded alimony to the wife "for the rest of her life or until she remarries."[51] This

45. Baker v. Baker, 299 So. 2d 138 (Fla. 3d Dist. 1974).
46. Neckman v. Neckman, 298 So. 2d 534, 535 (Fla. 3d Dist. 1974).
47. Goldstein v. Goldstein, 284 So. 2d 225 (Fla. 3d Dist. 1973).
48. Bob v. Bob, 310 So. 2d 328 (Fla. 3d Dist. 1975).
49. Moore v. Moore, 311 So. 2d 152 (Fla. 3d Dist. 1975).
50. 283 So. 2d 342 (Fla. 1973).
51. *Id.* at 343.

judgment was not based upon a separation agreement. The husband did not appeal from the award and complied with it for approximately four years prior to his death. The Supreme Court of Florida cited the case of *Aldrich v. Aldrich*[52] for the rule that although a trial court may not have power to award alimony as a charge against the estate of a husband during the lifetime of the wife, if the husband should fail to appeal from such an award and comply with it he has, in effect, consented to it. The award therefore would not be subject to collateral attack after his death and would be a charge against his estate. The court, however, chose to modify the effect of *Aldrich* by holding that pursuant to sections 61.14 and 61.08 of the Florida Statutes, the personal representative of the estate of the deceased husband may apply to the trial court which may re-examine the award and grant a lump-sum award in order to avoid delaying the closing of the estate. The trial court judge should consider the present worth of the wife based on her life expectancy, the probability of remarriage, her separate estate, her prospects for employment, health, etc., in determining the amount of the lump-sum award. Subsequent to the *Ford* case, one district court of appeal has held that a court has no authority to order, in a dissolution judgment, that alimony should continue after the death of the husband even though the wife is permanently disabled and mentally incompetent.[53] Nevertheless, another district court of appeal has held that in appropriate circumstances (such as advanced age and poor health of the wife) a court may order that alimony and child support should continue beyond the death of the husband and that if he should predecease her, this alimony shall become a lien against his residential property. Further, the court may enjoin the sale of the property until further order of the court so as to effectuate the alimony and child support provisions.[54] It is fascinating to note that both courts cited *Ford* as authority for their inconsistent views.

A trial court should award "permanent" alimony to a mother of four minor children when the facts show that she is fulfilling the role of a mother; however, "permanent" alimony is not necessarily to be considered as an award forever because when the children have become adults it may well be appropriate for a modification of the award to be made.[55]

52. 163 So. 2d 276 (Fla. 1964).

53. Bunn v. Bunn, 311 So. 2d 387 (Fla. 4th Dist. 1975), *following* Aldrich v. Aldrich, *and distinguishing* First Nat'l Bank v. Ford, 283 So. 2d 342 (Fla. 1973).

54. Rouse v. Rouse, 313 So. 2d 458 (Fla. 3d Dist. 1975).

55. Ruhnau v. Ruhnau, 299 So. 2d 61 (Fla. 1st Dist. 1974).

E. *Life Insurance and Alimony*

Alimony normally ceases upon the death of the former husband and, therefore it is reversible error for a trial court in marriage dissolution proceedings to order a husband to obtain a life insurance policy on his life with his wife as the beneficiary.[56]

F. *Rehabilitative Alimony*

It would appear to be reversible error to award rehabilitative alimony without providing for a specific termination date in the order.[57] Furthermore, if a wife has acquired a large separate estate, then no rehabilitation process is necessary or contemplated and it is error to award rehabilitative alimony.[58]

If a wife "is a trained physical therapist and will not require retraining or further education to pursue her chosen field,"[59] she is not entitled to any rehabilitative alimony even though she testified that "she was experiencing some difficulty in finding employment because of the current economic recession."[60]

It has been held to be reversible error for a trial court to award alimony for three years as rehabilitative alimony when the wife was 55 years old, had never worked, had poor health and failing vision, the marriage was of 13 years duration with a high standard of living and the husband had substantial sources of income. Permanent alimony either in lump-sum or in installments should have been awarded.[61] It has also been held to be reversible error for a trial court to award rehabilative alimony to a wife aged 56 for a period of only 5 years, when the facts show that she had not worked since 1945, there was no evidence that she was employable and there was no evidence that she would in fact be rehabilitated when she was 61 years old.[62]

In reversing an award of rehabilitative alimony and ordering the trial court to award permanent alimony, the District Court of Appeal, Second District, has said that when the wife is 44 and the husband 47, the husband earns $29,000 per year while the wife is unemployed with only a high school education and no skills, and it

56. Faidley v. Faidley, 298 So. 2d 425 (Fla. 3d Dist. 1974).

57. Zilbert v. Zilbert, 287 So. 2d 100 (Fla. 3d Dist. 1973), *aff'd in part, rev'd in part*, 305 So. 2d 214 (Fla. 3d Dist. 1974) (per curiam).

58. Mertz v. Mertz, 287 So. 2d 691 (Fla. 2d Dist. 1973).

59. Sisson v. Sisson, 311 So. 2d 799 (Fla. 1st Dist. 1975).

60. *Id.* at 801.

61. Dash v. Dash, 284 So. 2d 407 (Fla. 3d Dist. 1973).

62. Reback v. Reback, 296 So. 2d 541 (Fla. 3d Dist. 1974).

is unlikely that she will be able to secure employment paying more than one quarter of what her husband earns, it is only proper that the husband be required to give her support on a permanent basis "subject always to the right of obtaining relief under changed circumstances."[63]

It is also reversible error to award rehabilitative alimony to a wife who has no business experience or training, has never been employed except for some part-time modeling 15 years prior to the dissolution action, whose health is not good and who must take care of very young children. The former wife is entitled to permanent alimony.[64]

An award of rehabilitative alimony for a period of 2 years is improper when the wife (who has a ninth grade education) will be 58 years old when the payments terminate, will have dismal employment prospects as a receptionist because of age, and her physician-husband is well able to furnish adequate support.[65]

In considering whether to award permanent alimony or rehabilitative alimony under section 61.08(1) of the Florida Statutes, a trial court may consider as a factor inducing the award of permanent rather than rehabilitative alimony, that the wife, upon resigning her employment at the insistence of her husband during the marriage, suffered a loss of senority with her employer.[66]

When the spouses are both medical doctors and the wife can earn more than $30,000 per year, it is error to award her permanent alimony and she is at best entitled to no more than rehabilitative alimony for a short period of time to enable her to adjust to her new circumstances.[67]

Although it may be correct for a trial court to award rehabilitative alimony for a limited period of 1 year, it may be reversible error for the trial court to limit the former husband's duty to make mortgage payments and to pay taxes and insurance on the marital home for only 1 year when the home is to be used for the former wife and their children. The latter duty should continue until the wife's right to possession of the house for her use and the use of the children should terminate.[68]

An appellate court may hold that an award of permanent ali-

63. Lash v. Lash, 307 So. 2d 241, 243 (Fla. 2d Dist. 1975).
64. Goldstein v. Goldstein, 310 So. 2d 361 (Fla. 3d Dist. 1975).
65. Patterson v. Patterson, 315 So. 2d 104 (Fla. 4th Dist 1975).
66. Brook v. Brook, 289 So. 2d 766 (Fla. 3d Dist. 1974).
67. Peck v. Peck, 291 So. 2d 211 (Fla. 4th Dist. 1974).
68. Baker v. Baker, 291 So. 2d 33 (Fla. 3d Dist. 1974).

mony is excessive in light of the needs of the wife and the ability of the husband to pay, but the court may then decide not to disturb the order and to consider it as rehabilitative alimony limited to a period of 2 years from the date of the issuance of the mandate of the court.[69]

An award of alimony which provides that it is to run until further order of the court and that the court retains jurisdiction over the parties may be affirmed on appeal despite the protests of the husband that since he was to retire in 5 years the award should have been a rehabilitative one. The award, however, no matter what it is labeled, may be modified upon a change of circumstances.[70]

The District Court of Appeal, Third District, has affirmed an award of rehabilitative alimony to a wife in the amount of $1,750 per month for 5 years when the wife was undergoing psychiatric treatment, was a medical school student and her physician-husband was earning approximately $133,000 per year.[71]

The District Court of Appeal, Third District, apparently has held that when a wife, age 36, was married at age 19, has had neither extensive schooling nor training, has had no experience in supporting herself, and her only employment was for 2 weeks as a receptionist, "there is nothing to which the wife can be rehabilitated."[72] The court reversed the award of rehabilitative alimony and made the award permanent. "If, after some period of time, she should acquire or become possessed of the ability to support herself to an extent which should relieve the husband of his obligation in that respect in whole or in part, that would constitute a change of circumstances for which the husband might seek relief from continued payment of alimony."[73] This opinion would seem to have the effect of not obligating the wife to make any effort to rehabilitate herself by acquiring any training or education. If this analysis is correct, then the rehabilitative section of the Dissolution of Marriage Act would appear to have been judicially repealed.

On the other hand, the District Court of Appeal, First District, has seemed to indicate that a former wife does have an affirmative obligation to become rehabilitated or the obligation for continued alimony by the husband will be terminated.[74]

69. Tierney v. Tierney, 290 So.2d 136 (Fla. 2d Dist. 1974).
70. Lockhart v. Lockhart, 293 So. 2d 754 (Fla. 3d Dist. 1974).
71. Baker v. Baker, 299 So. 2d 138 (Fla. 3d Dist. 1974).
72. Schwartz v. Schwartz, 297 So. 2d 117, 119 (Fla. 3d Dist. 1974).
73. *Id.*
74. Kessinger v. Kessinger, 297 So. 2d 322 (Fla. 1st Dist. 1974).

The District Court of Appeal, First District, has frowned upon a trial court's termination of permanent alimony 2 year after the order in modification proceedings when the original alimony award was based upon a stipulation and there had not been any change in the circumstances of the parties. The appellate court extended the phase-out period to 3 years which would give the former wife "ample time to prepare herself for making a living."[75]

It is not an abuse of discretion for a trial court to award rehabilitative alimony as compared to permanent alimony to a wife whose children are adults when she is a registered nurse and has a modest savings account and while the husband is a clerk earning approximately $757.00 per month, even though the parties were married for 25 years and the wife had not worked since 1970.[76]

A trial court should (under pain of being reversed) reserve jurisdiction to award permanent alimony (in the event of a subsequent change of circumstances) when it awards rehabilitative alimony.[77]

A final dissolution of marriage judgment which provides for "temporary rehabilitative alimony"[78] for a period of 6 months may be modified under section 61.14 of the Florida Statutes because there is no difference between "temporary rehabilitative alimony" and "rehabilitative alimony."

A divorce judgment recited that "the court awards as rehabilitative alimony to be paid by the Respondent-Husband to the Petitioner-Wife the lump-sum alimony of Thirty Thousand . . . Dollars to be paid on the basis of One Thousand . . . Dollars per month for the next thirty months . . . ."[79] Before the monthly payments were completed the wife remarried, and her new husband had sufficient means to support her. The former husband brought suit to eliminate the monthly payments on the ground that the wife's new marriage terminated her need for rehabilitative alimony. In stating that the intent of the original judgment was to give the wife lump-sum alimony payable in monthly installments for the benefit of the former husband, the trial court refused to terminate the payments. Upon appeal it was held that the alimony was denominated as "rehabilitative" in the original judgment and that the former wife was not entitled to payments subsequent to her new marriage.

75. Protheroe v. Protheroe, 300 So. 2d 748, 749 (Fla. 1st Dist. 1974).
76. Fesak v. Fesak, 303 So. 2d 47 (Fla. 3d Dist. 1974).
77. Nichols v. Nichols, 304 So. 2d 497 (Fla. 1st Dist. 1974).
78. Cantor v. Cantor, 306 So. 2d 596, 597 (Fla. 2d Dist. 1975).
79. Blackmon v. Blackmon, 307 So. 2d 887, 888 (Fla. 3d Dist. 1974).

G. *Lump-Sum Alimony*

The Supreme Court of Florida has reversed the District Court of Appeal, Third District, which had affirmed a trial court award of lump-sum alimony of $7,200 to a wife from a husband who had a net worth in excess of $3,000,000 and a yearly income of over $90,000. The parties had been married for 7 years and had one child; the wife was working as a grocery store check-out girl at the time of the marriage and did not have a high school education. It seems clear that the court was of the view that the husband would be liable for permanent alimony in an amount which would allow the wife to maintain the same living style as during the marriage.[80]

The District Court of Appeal, Second District, has upheld (in a split opinion) a lower court award to the wife of life insurance policies owned by the husband on his own life as a part of a lump-sum alimony. It would seem that this could be construed as an alimony award payable after the death of the husband.[81]

A cash award as lump-sum alimony and an additional lump-sum alimony award of the husband's interest in the former marital residence of the parties, although unusual, may be justified by the fact that he has absented himself from the state and has been in contempt of the court for failure to pay temporary alimony.[82]

A wife who is a very successful "wheeler-dealer" and worth more than a quarter of a million dollars is not entitled to lump-sum alimony, periodic alimony or the maintenance of life insurance by her husband even though he earns more than the wife and is much more wealthy than she.[83]

A wife is not entitled to lump-sum alimony and attorney's fees when neither party is able to work (because of advanced age) and her special equity interest in property owned by the husband equals (if not exceeds) his in value.[84]

Likewise, if the wife has a separate estate which is larger than that of her husband and she receives "a passive income" from this property which is sufficient to support her without the necessity of working, she is not entitled to lump-sum or any kind of alimony.[85]

A judgment compelling the payment of lump-sum alimony is a

80. Keller v. Keller, 308 So. 2d 106 (Fla. 1974), *rev'g* 287 So. 2d 351 (Fla. 3d Dist. 1973).
81. Harrison v. Harrison, 284 So. 2d 13 (Fla. 2d Dist. 1973).
82. Vandervoort v. Vandervoort, 300 So. 2d 694 (Fla. 3d Dist. 1974).
83. Kennedy v. Kennedy, 303 So. 2d 629 (Fla. 1974).
84. Colman v. Colman, 314 So. 2d 156 (Fla. 4th Dist. 1975).
85. White v. White, 314 So. 2d 187, 188 (Fla. 4th Dist. 1975).

money judgment within the meaning of Rule 5.7, Florida Appellate Rules, which provides that a supersedeas bond should be in an amount sufficient to satisfy the judgment together with other enumerated items.[86]

It is proper to award the marital residence to the wife as lump-sum rehabilitative alimony when she is disabled as the result of being shot by her husband and she is on welfare.[87]

H. *Enforcement of the Award*

A contempt order for a former husband's failure to pay alimony must provide that he has the "unequivocal right" to purge himself of this contempt by complying with the terms of the order.[88]

A former husband who has been ordered to pay alimony may not evade this order by refusing to practice his profession of medicine.[89]

A trial court may not hold a former husband in contempt for failure to pay alimony until his perfected interlocutory appeal contesting jurisdiction is determined. Further, the court may not order him to make payments and then prospectively direct the sheriff to take him into custody for contempt of court if he fails to make the payments. Due process requires that the former husband be afforded an opportunity to show cause why he should not be held in contempt.[90]

A court does not have the power to hold a former husband in contempt for his failure to pay a money judgment for accrued alimony because this would be imprisonment for a debt. The wife's action in reducing accrued unpaid alimony payments to a judgment takes away her ability to use the contempt process to collect the arrearages.[91]

The failure of a former wife to request her former husband to pay support payments to her for a period of 8 years does not give rise to the defense of laches when the former husband is unable to prove a change of a position in reliance on any understanding or assumption that she would not attempt to collect this support. Further, since the moneys in question were for the support of the former wife and a daughter, and the former husband had contributed to the

86. Knipe v. Knipe, 290 So. 2d 71 (Fla. 2d Dist. 1974).
87. Barrett v. Barrett, 305 So. 2d 260 (Fla. 3d Dist. 1974).
88. Newton v. Newton, 287 So. 2d 410, 411 (Fla. 2d Dist. 1973).
89. Kalmutz v. Kalmutz, 299 So. 2d 30 (Fla. 4th Dist. 1974).
90. Strauser v. Strauser, 303 So. 2d 663 (Fla. 4th Dist. 1974).
91. Clark v. Muldrew, 308 So. 2d 136 (Fla. 4th Dist. 1975).

support of this daughter during the 8 year period, he would be entitled to a credit for these payments.[92]

Notice to a former spouse of a hearing upon a motion for an order of contempt may be sent by mail; a contempt hearing notice does not require service by the sheriff.[93]

I. *Modification of Alimony*

A fundamental change in the circumstances of the parties is an absolute prerequisite in proceedings for modification of support.[94]

In determining the modification of alimony a court should consider the former husband's assets as well as his current income and the fact that although his income has been substantially reduced, it may be the result of a voluntary act by him with the intent to reduce his alimony obligations.[95]

It is reversible error to reduce an alimony and child support award on the basis that the former husband's net weekly income has been reduced when his gross income has remained the same and he has not explained the reasons for the alleged reduction in his net income. Further, the trial court should not have considered the petition for modification while the former husband was in default in paying accrued amounts and there was no proof that he was unable to pay the defaulted amounts.[96]

Inasmuch as unpaid support payments constitute a vested property right, a court has no power to modify them retroactively.[97]

A final divorce judgment awarded the wife and children use of the family home until it was disposed of by partition or other process and also awarded alimony and child support to the wife. The judgment simply allowed partition but did not foresee that the husband would seek partition soon after the divorce. As a result, if the wife and children are forced to leave the home because of the former husband's partition suit, the wife is entitled to an increased award of alimony and child support because this would be a change in the financial circumstances of the wife.[98]

When there is an indication of a conspiracy between a woman's first husband and her second husband such that the second husband

92. Jimenez v. Jimenez, 309 So. 2d 38 (Fla. 3d Dist. 1975).
93. Spencer v. Spencer, 311 So. 2d 823 (Fla. 3d Dist. 1975).
94. Young v. Young, 290 So. 2d 566 (Fla. 4th Dist. 1974).
95. Gamse v. Gamse, 291 So. 2d 620 (Fla. 3d Dist. 1974).
96. Feder v. Feder, 291 So. 2d 641 (Fla. 3d Dist. 1974).
97. Smith v. Smith, 293 So. 2d 767 (Fla. 2d Dist. 1974).
98. Neel v. Neel, 298 So. 2d 514 (Fla. 4th Dist. 1974).

is to marry and then divorce her in order for the second marriage to terminate the right to alimony under the first marriage and there is no proof that the second marriage is irretrievably broken, the trial court should continue jurisdiction over the matter in order to direct the parties to attempt reconciliation. If reconciliation proves unsuccessful and if a conspiracy is shown to exist, then the trial court should award alimony to be paid by the second husband in the same amount that the wife lost from the first as a result of the second marriage.[99]

If the former wife's income has substantially increased over the years since a divorce while the former husband's income has remained substantially the same, it may be an abuse of discretion for the trial court to reduce the amount of alimony payments (at the request of the former husband) without fixing a termination date for the payment of all future alimony.[100]

A trial court judge is not justified in refusing to modify an alimony award even though the former husband, in response to a question from the judge as to what amount he would be willing to pay, replied that no alimony was justified and that he would not pay any further alimony. The amount of alimony must be fixed based on the former wife's needs and the former husband's ability to pay.[101]

Moreover, it is reversible error for a trial court to reduce the amount of periodic alimony awarded by a foreign decree when the former wife's needs have increased and the former husband's ability to pay has also increased. It is also error to refuse to enter judgment against the former husband for arrearages accrued under the foreign judgment and to order that he pay it at the rate of $100 per month, when the only reason for doing so was that he might have to dispose of some of his assets in order to pay the accrued sum of $7,290.[102]

It is also reversible error for a trial court to eliminate the former husband's obligation to pay alimony (under a prior award) when he simply asked the court to reduce the amount of alimony because of a change in his circumstances.[103]

A retired former husband who secures temporary employment which increases his income may be forced to pay increased alimony

99. Little v. Little, 298 So. 2d 474 (Fla. 1st Dist. 1974).
100. Craig v. Craig, 298 So. 2d 189 (Fla. 1st Dist. 1974).
101. Tarr v. Tarr, 299 So. 2d 148 (Fla. 3d Dist. 1974).
102. Friedly v. Friedly, 303 So. 2d 50 (Fla. 2d Dist. 1974).
103. Herbert v. Herbert, 304 So. 2d 465 (Fla. 4th Dist. 1974).

on the basis that "[w]hile the increase in earnings above that anticipated at the time of the entry of the order of modification after the husband retired may be temporary, it does indicate a change in circumstances to the extent that it shows the former husband had an ability to earn if he so desired."[104]

When an order of modification of judgment of dissolution which reduces the husband's alimony payments is appealed by the wife without stay and it is reversed on appeal without any direction from the appellate court, the trial court should reinstate the original judgment of dissolution retroactively to the date of modification. This will result in placing the parties in the same position as they were in prior to the modification proceedings.[105]

J. *Appeals*

An appeal by an appellant who is in contempt of the lower court may be dismissed upon petition of the appellee unless the appellant purges himself of the contempt by complying with the order of the trial court.[106]

A commitment order in contempt proceedings which recites that the former husband is in contempt for failure to pay court costs when he has the ability to pay, is not subject to attack by habeas corpus proceedings instead of an appeal from the order of contempt when the husband contends that he does not have the means to pay.[107]

K. *Legislation*

The chief judge of any judicial circuit with the approval of the county commissioners may now authorize the creation of a central system for the enforcement of support, alimony or maintenance payments ordered by the courts. The system is to be administered by an administrator (who must be a member of the Florida Bar) appointed by the chief judge. The act would seem broad enough to permit the administrator to enforce support awards for the wealthy as well as the indigent; inasmuch as county funds will be the primary source of support, it would appear that this is one more step towards "judicare."[108]

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104. Mansfield v. Mansfield, 309 So. 2d 629 (Fla. 3d Dist. 1975).
105. Bock v. Bock, 311 So. 2d 684 (Fla. 2d Dist. 1975).
106. Durham v. Durham, 297 So. 2d 857 (Fla. 4th Dist. 1974).
107. Gazil v. Heidtman, 309 So. 2d 574 (Fla. 4th Dist. 1975).
108. Fla. Laws 1975, ch. 75-148, *creating* FLA. STAT. §§ 61.181(3)-(6) (1975).

V. PROPERTY RIGHTS

A. *Jurisdiction and Res Judicata*

A trial court may enter an interlocutory order granting a dissolution of marriage and in the same order reserve jurisdiction to determine property rights at a later time.[109]

A final dissolution of marriage judgment is res judicata as to all property rights of the parties which were raised or which could have been raised in the action, and a court may enjoin a former spouse from bringing an action in a foreign state concerning the property.[110]

Once the trial court has adjudicated the property rights of the spouses in a judgment which has become final, the chancellor may not subsequently redetermine those rights.[111]

If a husband has agreed to maintain a life insurance policy on his life for the benefit of his former wife and this agreement has been incorporated into a dissolution judgment, a court may not later order that the beneficiary be changed from the wife to the children because her interest in the policy was a property right not subject to modification under section 61.14 of the Florida Statutes.[112]

B. *Homestead*

A divorced, unremarried man who has lived alone and who has neither provided support or control for his minor daughters nor ever lived with them in his home can still be the head of a family under the Florida homestead laws and any devise of the property made by him will be invalid.[113]

A complaint brought by children alleging that their father, without consideration, conveyed homestead property to himself and his wife (their mother) as an estate by the entirety, and asking the court to declare the transaction to be void as an attempted alienation of homestead property under the Constitution of 1885, states a cause of action.[114]

The District Court of Appeal, First District, has held that sections 689.11(1) and (2) of the Florida Statutes, which purport to permit the conveyance of homestead property by a husband to the

109. Hyman v. Hyman, 310 So. 2d 378 (Fla. 2d Dist. 1975).
110. Simon v. Simon, 293 So. 2d 780 (Fla. 3d Dist. 1974).
111. Schneider v. Schneider, 296 So. 2d 77 (Fla. 3d Dist. 1974).
112. Sheffield v. Sheffield, 310 So. 2d 410 (Fla. 3d Dist. 1975).
113. *In re* Estate of Deem v. Shinn, 297 So. 2d 611 (Fla. 4th Dist. 1974).
114. Miller v. Miller, 293 So. 2d 760 (Fla. 3d Dist. 1974).

wife (or vice versa) without the joinder of the spouse receiving the title, is in conflict with article X, section 4(c) of the Florida Constitution (as amended in 1972), which requires the joinder of the other spouse when the owner alienates the homestead, and is, therefore, unconstitutional. The legislature seems to be unable to remedy the original error covering homesteads and tenancies by the entirety.[115]

In the absence of minor children (even though there are adult children), a testator can devise homestead property to his surviving wife under article X, section 4 of the Constitution of Florida adopted in 1968 (as amended in 1972).[116]

C. *Partition*

It was decided in the case of *Walton v. Walton*[117] that a trial court may make an equitable division of real property between the spouses even if it is held as an estate by the entirety provided one of the spouses seeks this relief and it is tried by the court without objection by the other spouse. The District Court of Appeal, Fourth District, has refused to follow the lead of the *Walton* case, however, and has held that a prayer for the division of the spouses' property as contained in a dissolution of marriage complaint is an insufficient predicate for a court to decree a partition of the parties' property; the parties must proceed in accordance with chapter 64 of the Florida Statutes.[118]

The awarding to a former wife of the exclusive use and possession of the jointly owned family home for the benefit of the former wife and children does not prevent her from subsequently waiving this benefit by bringing an action for partition.[119]

A court in dissolution proceedings has no authority to award to a former husband his former wife's joint interest in a business and the property upon which it is located unless the parties agree to this division or the former husband properly pleads for partition.[120]

D. *Special Equities Doctrine*

The District Court of Appeal, Second District, in a split deci-

115. Foerster v. Foerster, 300 So. 2d 33 (Fla. 1st Dist. 1974).

116. *In re* McCartney, 299 So. 2d 5 (Fla. 1974).

117. 290 So. 2d 110 (Fla. 3d Dist. 1974).

118. Niemann v. Niemann, 294 So. 2d 415 (Fla. 4th Dist. 1974), *followed in* Ramirez v. Ramirez, 302 So. 2d 25 (Fla. 4th Dist. 1975); *accord*, Wischmon v. Wischmon, 310 So. 2d 428 (Fla. 2d Dist. 1975).

119. Dwyer v. Dwyer, 305 So. 2d 10 (Fla. 1st Dist. 1974).

120. Wilbur v. Wilbur, 299 So. 2d 99 (Fla. 3d Dist. 1974).

sion has held that in order to prove a special equity in property it is only necessary to prove the case by "clear and convincing"[121] testimony. The dissenting judge was of the view that the well established law of Florida makes it mandatory for the prevailing party to prove his or her case "to the exclusion of a reasonable doubt."[122]

In order for a wife to prove a special equity in property held as an estate by the entirety it is necessary for her to trace her funds or property into the subject home; proof that her property was used to buy a new car and pay living expenses for the couple would not be sufficient.[123]

In the absence of fraud, after a husband has conveyed to his wife his interest in jointly held property, he is not entitled to a special equity in this property unless he made some "new significant contribution to the value of the property, either financially or in services, so that it would be inequitable for the grantee to retain the entire property without recognition of this special equity."[124]

There seems to be no objection to a Florida court (which has jurisdiction over the parties) granting a wife a special equity in real estate (a service station) owned by the husband in a foreign state.[125]

It is reversible error for a trial court to deny a wife the right to amend her petition for dissolution of marriage when she seeks to show that her husband's parents had made a gift to the couple of the marital condominium while the parents retained title in their own name and held title as trustees for the wife and her husband. She may nonetheless seek to establish her own interest in the condominium and a special equity in her husband's interest.[126]

In her suit praying for dissolution of her marriage, a wife's motion to compel discovery of the books and records of an out-of-state corporation, an accounting and a special equity in the corporation should not be denied because it is an out-of-state corporation which was not a party to the suit and the husband is the sole owner of the corporation.[127] However, when a corporation is not a party to a dissolution proceeding, it is improper for the court to adjudicate that the wife does not have a special equity in certain properties of the corporation.[128]

121. Abbott v. Abbott, 297 So. 2d 608 (Fla. 2d Dist. 1974).
122. *Id.* at 609.
123. Baker v. Baker, 315 So. 2d 217 (Fla. 1st Dist. 1975).
124. Floyd v. Floyd, 297 So. 2d 609 (Fla. 4th Dist. 1974).
125. Razzano v. Razzano, 307 So. 2d 894 (Fla. 1st Dist. 1975).
126. Goldberg v. Goldberg, 309 So. 2d 599 (Fla. 3d Dist. 1975).
127. Lytton v. Lytton, 289 So. 2d 17 (Fla. 2d Dist. 1974).
128. Couture v. Couture, 307 So. 2d 194 (Fla. 3d Dist. 1975).

If the wife's parents lent money to the wife to be used to make the downpayment for the purchase of the marital home, the wife would be entitled to a special equity upon dissolution. Conversely, if the loan was made to the husband and wife jointly, she would not be entitled to a special equity.[129]

Neither spouse may alone encumber real property held as an estate by the entirety, and a divorce judgment is not final until it is written and signed by the judge. A combination of these two rules renders invalid a mortgage executed by the wife alone on entirety property on the same day that the judge orally stated that the marriage was to be dissolved when the written final judgment was executed thereafter.[130]

It is the well established rule in Florida that when a husband purchases property with his own funds and the title is placed in the name of both the husband and wife there is a presumption of law that the husband intended to make a gift to the wife. This presumption, however, only extends to those payments made by the husband during the time the parties lived together, and if the husband made any mortgage payments subsequent to the permanent separation of the parties, the presumption would not apply. The husband should be granted a special equity in the property to the extent of his payment of his wife's share of the payments.[131]

E. *Beyond the Special Equities Doctrine*

A trial court may not, after finding specifically that the wife is not entitled to alimony, or to a special equity interest in jointly held real property, award an interest in the property to her on the basis that she changed her position in entering into the marriage with the hope that it would succeed and that she should, therefore, receive some kind of an award based upon that expectation.[132]

Moreover, it is improper to award a husband a one-half interest in real property owned by his wife on the general equitable principle that he is entitled to "greater consideration" than a simple order dissolving the marriage because during the marriage he adopted his wife's son by a prior marriage and supported him and the wife during the marriage.[133]

129. Howard v. Howard, 310 So. 2d 420 (Fla. 4th Dist. 1975).
130. Leitner v. Willaford, 306 So. 2d 555 (Fla. 3d Dist. 1975).
131. Heinemann v. Heinemann, 314 So. 2d 220 (Fla. 1st Dist. 1975).
132. Hanzelik v. Hanzelik, 294 So. 2d 116 (Fla. 4th Dist. 1974).
133. DeLones v. DeLones, 297 So. 2d 585, 588 (Fla. 3d Dist. 1974).

In the absence of proof that a husband has a special equity in the wife's one-half interest in an estate by the entirety or that he is entitled to alimony, it is reversible error for a trial court to award the wife's one-half interest in a tenancy by the entirety to the husband on the basis that the marriage lasted only 121 "constantly battling" days during which time the parties conveyed property to each other jointly as tenants by the entirety.[134]

It is an abuse of discretion and thus reversible error for a trial court to award the husband's interest in the marital home (held as an estate by the entirety) "in lieu of any further alimony, either rehabilitative or permanent."[135]

F. *Estates by the Entirety and in Common*

If a marital home is held as an estate by the entirety, it is error for the trial court to order that it be placed in trust for the use and benefit of the minor children and that subsequent thereto the property be mortgaged to raise funds to pay the debts of the parties, in the absence of any pleadings asking for this form of relief.[136]

In the absence of proper pleadings, it is also reversible error to adjudge that the marital home (held as an estate by the entirety) should be sold when the children reach their majority and the proceeds divided equally between the former spouses.[137]

The Supreme Court of Florida, in reversing the District Court of Appeal, Fourth District, has held that when no special equity has been proven and the award is not lump-sum alimony, the trial court cannot order a husband to convey his interest in jointly held property to his wife.[138] On the other hand, a district court subsequently held that it is permissible for a trial court to award to the wife the husband's interest in an estate by the entirety in the family home based upon the length of the marriage, the age and health of the wife, etc.[139]

When the marital home is owned by the husband alone and the husband and wife sign a deposit receipt contract to sell the property, this does not suffice to show an intention to create an estate by the entirety in the proceeds of the sale. If the husband should then die

134. McKay v. McKay, 293 So. 2d 766 (Fla. 2d Dist. 1974).
135. Venzer v. Venzer, 308 So. 2d 544, 546 (Fla. 3d Dist. 1975).
136. Arnold v. Arnold, 292 So. 2d 384 (Fla. 3d Dist. 1974).
137. Riggs v. Riggs, 310 So. 2d 322 (Fla. 3d Dist. 1975).
138. Owen v. Owen, 284 So. 2d 384 (Fla. 1973).
139. Hiltz v. Hiltz, 295 So. 2d 693 (Fla. 1974).

before the closing, the wife is entitled to a dower interest in the proceeds of sale.[140]

It is not an abuse of discretion for the trial court to order the husband to pay the mortgage payments, taxes and insurance on the marital home owned by the former spouses as tenants in common because the original judgment provided that both parties could continue to live in the home after the divorce and he continued to do so.[141]

In the absence of a special equity, it is error for a trial court to award to the husband the exclusive possession of the marital home (entirety property) until his death, remarriage, until he moves, or until the property is sold, when there are no minor children who are to live in the home.[142]

A final dissolution judgment which provides that the wife and minor children should have the right to occupy the marital home (entirety property) should also provide that this right to continued occupancy will terminate upon her remarriage. In addition, when the judgment orders the husband to pay the mortgage payments, taxes and insurance during the period the property is occupied by the former wife, the judgment should provide that in the event of a sale of the property the former husband will be entitled to a credit from the sales proceeds of one-half of the amount paid for maintenance of the home.[143]

A trial court may now under the Dissolution of Marriage Act award exclusive possession of a home formerly held by the entirety to a husband who has been granted custody of the minor children of the marriage.[144]

G. *Temporary Relief*

Under the Dissolution of Marriage Act, a trial court has the power to grant temporary relief by ordering the wife to transfer money from her savings account (the funds in question were formerly held in a joint account of the spouses and she withdrew the funds and opened her account) to the husband for use in his used car business as operating capital. It was noted by the appellate court that this order provided that the husband was to account for this

140. *In re* Cardini, 305 So. 2d 71 (Fla. 3d Dist. 1975).
141. Carter v. Carter, 306 So. 2d 587 (Fla. 1st Dist. 1975).
142. Saviteer v. McAdoo, 310 So. 2d 28 (Fla. 2d Dist. 1975).
143. Hendricks v. Hendricks, 312 So. 2d 792 (Fla. 3d Dist. 1975).
144. Richardson v. Richardson, 315 So. 2d 513 (Fla. 4th Dist. 1975).

money and that it was not a final determination of ownership of the funds.[145]

H. *Gifts Between Spouses*

The District Court of Appeal, Second District, has followed the case of *Steinhauer v. Steinhauer*[146] by holding that when the wife's separate funds are used to purchase property as an estate by the entirety she is presumed to have made a gift to her husband. The court further held that this change in presumption dated from the adoption of the 1968 Florida Constitution rather than from the adoption of the 1971 Dissolution of Marriage Act.[147]

If the husband deposits money in a joint savings account with his wife, a rebuttable presumption arises that he has made a gift to her of at least one-half of the account.[148]

Similarly, a husband who changes a stock brokerage account in his name to a joint account in his and his wife's names in order to protect the account from potential creditors, and who then fails to change the account after the potential danger is removed, may be deemed to have made a gift to his wife of a one-half interest in the account.[149]

The facts in *Green v. Green*[150] would make a classic law school examination question. A trial lawyer, having tax difficulties, devised a system whereby certain income checks would not be deposited in his office account. Rather they were delivered to a bank with a cover letter instructing it to collect the checks and then issue cashier's checks made payable to his wife for the office manager account and the remaining checks to the lawyer or his wife. He died two days after delivering the check and the latter to the collecting bank. His widow then received the cashier's checks and cashed them. The tax problems had been settled in the meantime. Two witnesses testified that that the lawyer intended that the money was to be his wife's. The appellate court held that: (1) the requisite intention of the donor to transfer a present interest, (2) delivery by the donor, and (3) acceptance of the gift by the donee were proven.

145. Yohem v. Yohem, 295 So. 2d 656 (Fla. 4th Dist. 1974).

146. 252 So. 2d 825 (Fla. 4th Dist. 1971).

147. Ball v. Ball, 303 So. 2d 32 (Fla. 2d Dist. 1974), *followed in* Farris v. Farris, 304 So. 2d 526 (Fla. 2d Dist. 1975).

148. Saviteer v. McAdoo, 310 So. 2d 28 (Fla. 2d Dist. 1975).

149. Goldstein v. Goldstein, 310 So. 2d 361 (Fla. 3d Dist. 1975).

150. 314 So. 2d 801 (Fla. 3d Dist. 1975).

I. *Dower*

Widowers were allowed to elect to take dower under two amendments to the Florida statutes; one amendment specifically says that it shall not be applicable to any estate whose administration commenced prior to the effective date of the amendment;[151] the other amendment does not have similar language.[152] The District Court of Appeal, Third District, has held that neither amendment was to be given retroactive effect and neither was therefore applicable to estates being administered prior to the effective date of both amendments.[152]

J. *Contracts to Make a Will*

Section 731.051 of the Florida Statutes provides that no agreement to make a will, give a legacy, or make a devise shall be valid unless it is in writing and signed in the presence of two subscribing witnesses by the person whose executor or administrator is sought to be charged. In *Donner v. Donner*,[154] a husband and wife entered into a separation agreement in New York which provided that the husband promised to devise one-third of his estate to his wife provided that she survived him and remained unmarried. The separation agreement was not witnessed. Subsequently, an Alabama divorce court ratified the agreement, but it was not merged in the judgment. Still later, a Florida court enforced certain provisions of the agreement, and then a New York court upheld the agreement over the former husband's contention that it was collusive and against the public policy of New York. In the instant proceedings, instituted after the husband's death, the Florida court held that the three court proceedings in Alabama, Florida and New York barred the contention that the agreement was not in accordance with the Florida statute on the grounds of res judicata and full faith and credit. Judge Carroll, in a strong dissent, pointed out that this statutory defense could not have been asserted by the former husband during his lifetime because the agreement would not come into contention until he died and was survived by his former wife who was then single. As a consequence, the prior judgments were neither res judicata nor entitled to full faith and credit except for those matters which were actually decided in these cases. The dis-

151. Fla. Laws 1973, ch. 73-106 §5.
152. Fla. Laws 1973, ch. 73-107.
153. *In re* Geringer, 300 So. 2d 710 (Fla. 3d Dist. 1974).
154. 302 So. 2d 452 (Fla. 3d Dist. 1974).

sent further reasoned that neither New York nor Alabama could enter a judgment overturning the statutory law of Florida.

K. *Miscellaneous*

A husband cannot be imprisoned for contempt for his failure to make monthly payments to his former wife which were to be used to pay a mortgage on property formerly owned by the spouses. The court asserted that these payments were not alimony but a debt, and article 1, section 11 of the Florida Constitution forbids imprisonment for debt.[155]

When a complaint for specific performance for the purchase of land names only the husband as a defendant and the record does not indicate that the property is homestead or the separate property of the wife, and the complaint does not seek the relinquishment of any possible dower interest of the wife, the complaint states a cause of action for specific performance against the husband alone.[156]

When a husband assigns the income from his interest in an apartment complex as collateral for a loan and subsequently dies, his widow is not entitled to her dower interest in this income under section 731.34 of the Florida Statutes.[157]

L. *Legislation*

A family member may now appoint his spouse, parent or child as his attorney under a "durable family power of attorney" by executing a written instrument which states that "this durable family power of attorney shall not be affected by disability of the principal except provided by statute." This power of attorney is nondelegable and shall be valid until revoked or until the principal shall die or be adjudged incompetent. The power of attorney will be suspended at the time a petition to determine competency of the principal has been filed. It appears that the agent under this power of attorney has the power to convey and mortgage all property, both real and personal, whether a joint tenancy or tenancy by the entirety of the principal, with the exception of homestead property.[158]

The Gift to Minors Act has been amended to provide that a minor is a person who has not attained the age of 18 years, and to

155. Corbin v. Etheridge, 296 So. 2d 59 (Fla. 1st Dist. 1974).
156. Clark v. Byrne, 297 So. 2d 316 (Fla. 1st Dist. 1974).
157. Morton v. Morton, 297 So. 2d 79 (Fla. 3d Dist. 1974).
158. FLA. STAT. § 709.08 (Supp. 1974).

provide that the custodian is to turn over gift property to a donee when he has become 18 years old except in those cases where gifts were made prior to July 1, 1973. In the latter cases, custodial property is not to be delivered to the donee until he reaches the age of 21 years.[159]

VI. ATTORNEY'S FEES

Legal Services of Greater Miami, Inc., a federal agency, cannot be required to pay an attorney's fee to a guardian ad litem appointed at the request of the agency to represent a non-resident Cuban husband in a dissolution of marriage proceeding.[160]

Even though a wife has flouted the authority of a court of another state (to whose jurisdiction she had submitted herself) with respect to child custody matters, a Florida court may still award attorney's fees to her. Her actions will, however, be considered and the amount to be paid by the husband reduced.[161]

It is reversible error for a trial court to award attorney's fees when the pleadings do not seek an award and there is no evidence presented as to this matter.[162]

Section 61.16 of the Florida Statutes, which provides for the awarding of attorney's fees in any dissolution of marriage proceeding and for enforcement and modification proceedings under chapter 61, has been construed to authorize the awarding of attorney's fees to the husband to be paid by the wife when the husband brings suit to secure for the benefit of the children trust funds which have been entrusted to the former wife in accordance with a divorce decree.[163]

Under the terms of section 61.16 of the Florida Statutes, it is proper for a trial court to award attorney's fees, suit money and costs to a party who initiates modification proceedings for alimony and child support.[164]

An order of contempt for failure to pay the former wife's attorney's fees is absolutely void unless it specifically states that the court finds that the former husband has the ability to obey the command.[165]

159. Fla. Laws 1974, ch. 74-31, *amending* FLA. STAT. §§ 710.02, 710.05 (1973).
160. Fernandez v. Larrea, 309 So. 2d 178 (Fla. 3d Dist. 1975).
161. Spencer v. Spencer, 305 So. 2d 256 (Fla. 3d Dist. 1975).
162. Bob v. Bob, 312 So. 2d 798 (Fla. 3d Dist. 1975).
163. Blynder v. Blynder, 294 So. 2d 717 (Fla. 3d Dist. 1974).
164. Darcy v. Darcy, 285 So. 2d 59 (Fla. 4th Dist. 1973).
165. Ratner v. Ratner, 297 So. 2d 344 (Fla. 3d Dist. 1974).

A clause in a property settlement agreement which provides that "the wife specifically agrees to incur no obligation or other indebtedness or expenses that may be chargeable to the Husband . . ."[166] is not an express waiver of attorney's fees, and therefore, when the former husband brings proceedings to modify a child custody award (which was made in the original divorce judgment) the former wife may be entitled to attorney's fees for defending the proceedings.

An award of $17,500 attorney's fees was upheld when the testimony of attorneys was that a reasonable fee ranged from $7,500 to $25,000. However, since the husband earned only $250.00 per week, the appellate court ordered that the fee be paid in three equal annual installments.[167]

The Supreme Court of Florida has affirmed an attorney's fee award of $65,000 when the uncontradicted testimony showed that between 135 and 150 hours of work had been devoted to a phase of a case dealing with child support and alimony. The wife's expert witness testified that a fee of between $75,000 and $100,000 would be reasonable and the husband failed to present evidence of any kind relative to the issue. This award would seem to be at the rate of approximately $43.33 per hour.[168]

In a most unusual case, it was held that when the parties to a divorce settle their property rights (without the knowledge of their respective attorneys) by executing a written agreement which states that the "amount of attorney's fees shall be negotiated and determined between [the wife's attorney] and [the husband's attorney],"[169] it is the intent of the parties that the wife's attorney's fees were to be paid by the husband without a full hearing as to the wife's necessity and the husband's ability to pay. The husband's contention that the determination between the attorneys only fixed the amount of the fee, not the question as to which party was to pay it, was rejected by the court.

A trial court has the discretion to assess all costs against a former spouse who has been the cause for incurring the costs because of her perjured testimony, but the assessment may not be based upon the notion of punishment for her perjury.[170]

166. Scott v. Scott, 303 So. 2d 683 (Fla. 4th Dist. 1974).
167. Flipse v. Flipse, 305 So. 2d 16 (Fla. 3d Dist. 1975).
168. Posner v. Posner, 315 So. 2d 175 (Fla. 1975).
169. Novack v. Novack, 305 So. 2d 862 (Fla. 3d Dist. 1975).
170. McKennon v. McKennon, 312 So. 2d 804 (Fla. 1st Dist. 1975).

VII. ANTENUPTIAL AND POST-NUPTIAL PROPERTY SETTLEMENT AGREEMENTS

A. *Antenuptial Agreements*

When a wife, in accordance with the terms of a valid antenuptial agreement, receives assets from her husband valued in excess of $200,000 in lieu of any and all claims against him "for alimony, suit money or other maintenance during the [husband's] lifetime,"[171] it is reversible error to award permanent attorney's fees to her.

B. *Post-Nuptial Agreements*

One district court has held that a court is not bound to follow the alimony provisions set forth in a separation agreement,[172] but another[173] has decided that in light of the rationale of *Posner v. Posner*,[174] which upheld the validity of antenuptial agreements as to conditions existing at the time of the agreement (provided that the conditions of *Del Vecchio v. Del Vecchio*[175] are met), the alimony provisions contained in a separation agreement which is not tainted by fraud or overreaching and based upon full disclosure are valid as to conditions existing at the time the agreement was made and must be honored by the court.

1. INTERPRETATION OF AGREEMENTS

A property settlement agreement (subsequently made a part of a judgment of dissolution of marriage) which provides that the wife accepts "this Agreement in full satisfaction of all her right of dower, or right of alimony or other special equities in the properties which she might otherwise have been entitled to receive" is not sufficient to show the intent of the parties to relinquish an expectancy interest of the former wife in the proceeds of a life insurance policy and a profit sharing trust in which the former husband named his ex-wife as the beneficiary.[176] It has been held that when a separation agreement provides that the husband shall pay for alimony "the sum of $35.00 per week for a period of five (5) years, being a total of

171. Belcher v. Belcher, 307 So. 2d 918, 920 (Fla. 3d Dist. 1975).
172. Harris v. Harris, 291 So. 2d 95 (Fla. 1st Dist. 1974).
173. Bailey v. Bailey, 300 So. 2d 294 (Fla. 4th Dist. 1974).
174. 233 So. 2d 381 (Fla. 1970).
175. 143 So. 2d 17 (Fla. 1962).
176. Davis v. Davis, 301 So. 2d 154, 155 (Fla. 3d Dist. 1974).

$9,100.00,"[177] the parties must have intended this to be a lump-sum alimony arrangement payable in weekly installments. The remarriage of the wife before the expiration of the five year period would, therefore, not terminate the former husband's duty to continue to make weekly payments.

When a separation agreement (incorporated into the final judgment of dissolution) provides that the husband should pay to the wife "such income taxes on a quarterly basis upon the foregoing sums [alimony] as shall be required by the Internal Revenue Service . . ."[178] this does not also make the husband liable to pay income taxes assessed by the State and City of New York.

A property settlement agreement which provides that the "Wife shall at all times enjoy the exclusive right to use Lots 'A' and 'C' as pasture land during the life estate of the Husband"[179] is a valid restrictive covenant which will be enforced by the courts because it is for a lawful purpose, within reasonable bounds and the language is clear, notwithstanding the view that restrictive covenants are not favored by the law.

If death of a spouse intervenes after the signing of a property settlement agreement but before the completion of dissolution proceedings, parol evidence may be introduced to show that the property settlement contract was not to be effective between the parties until the dissolution judgment was entered, and, as a consequence, since the agreement never became effective, the surviving spouse becomes the sole owner of entirety property.[180]

2. MODIFICATION PROBLEMS

Florida courts have jurisdiction to modify separation agreements entered into in a foreign state when the parties are now Florida residents. If the separation agreement provides that it is governed by New York law then the Florida court will apply the appropriate law of New York.[181]

Alimony payments which originate out of a property settlement agreement may not be modified subsequently because of a change of circumstances of the parties, and if the husband mistakenly brings proceedings to modify the amount of alimony, the court may

177. Horne v. Horne, 289 So. 2d 39 (Fla. 2d Dist. 1974).
178. Tsavaris v. Tsavaris, 307 So. 2d 845, 847 (Fla. 2d Dist. 1975).
179. Zoda v. Zoda, 292 So. 2d 412 (Fla. 2d Dist. 1974).
180. Greenwald v. Blume, 312 So. 2d 783 (Fla. 3d Dist. 1975).
181. Hirsch v. Hirsch, 309 So. 2d 47 (Fla. 3d Dist. 1975).

award attorney's fees to the wife who defends against the sought for change.[182]

In *Waddell v. Waddell*[183] a property settlement agreement provided that the husband was to convey the family home to the wife "and pay all sums due or to become due upon the mortgage encumbering same and the taxes and insurance."[184] The District Court of Appeals, Third District, interpreted the quoted words to constitute a modifiable support provision rather than a nonmodifiable property settlement obligation. This interpretation was based primarily upon the notion that in construing the agreement as a whole and in light of the fact that it provided for alimony and child support, it was intended that these payments were to be in the nature of support rather than as a right attached to the land.

If the former wife is receiving alimony in accordance with the terms of a separation agreement (incorporated into the final judgment of dissolution) it would appear that she has no obligation to try to rehabilitate herself unless the agreement so requires.[185]

The fact that a former wife has become employed since the divorce (which approved the parties' separation agreement) may not be enough by itself to justify a modification of the alimony provisions of a separation agreement. The court should take into consideration the parties' "previous and present earning capacities, income and needs, changes in the cost of living, and perhaps even the latest socio-legal views relating to support."[186]

If the amount of alimony is based upon a separation agreement, a heavier burden rests upon the former husband who is seeking a reduction than would otherwise be required.[187]

When a property settlement agreement provides for the husband to pay alimony to the wife until she remarries, a court may not terminate alimony on the grounds that the former wife has entered into a de facto marriage by living with a man who is contributing to her support. It would appear that the amount of support contributed by the "other man" may be considered by the court in modification proceedings, but that the court may not terminate all payments on the de facto marriage allegation.[188]

182. Yagoda v. Klein, 305 So. 2d 29 (Fla. 3d Dist. 1975).

183. 305 So. 2d 30 (Fla. 3d Dist. 1975).

184. *Id.*

185. Quinn v. Quinn, 307 So. 2d 848 (Fla. 2d Dist. 1975).

186. Scott v. Scott, 285 So. 2d 423, 425 (Fla. 2d Dist. 1973).

187. Tsavaris v. Tsavaris, 307 So. 2d 845 (Fla. 2d Dist. 1975); Quinn v. Quinn, 307 So. 2d 848 (Fla. 2d Dist. 1975); Hagen v. Hagen, 308 So. 2d 41 (Fla. 3d Dist. 1975).

188. Sheffield v. Sheffield, 310 So. 2d 410 (Fla. 3d Dist. 1975).

If a husband should agree to maintain a life insurance policy on his life for the benefit of his wife and to make her the owner of the policy in return for her giving up all claims for support, this agreement constitutes a property settlement agreement which may not be modified even though the wife has remarried and is being supported by her new husband.[189]

An interesting question was presented in *In re Estate of Ingram*.[190] A husband signed a separation agreement and mailed it to the wife for her execution. The wife told her attorney about a furniture bill owed by the husband and the attorney told the husband's attorney that if the husband would pay the bill the wife would sign the separation agreement which included a provision giving up her dower interest in the husband's property. The husband's attorney sent a check for the furniture bill to the wife's attorney and she executed the agreement. Before her attorney mailed the agreement back to the husband's attorney, the wife asked her attorney to "hold the papers." A few weeks later, the husband died, and the wife's attorney asserted that the agreement was null and void and that she was entitled to dower.

The court held that the doctrine of promissory estoppel was not present because there was no evidence that the husband was induced to take any action or forebearance of a substantial nature since he was in reality only paying his own debt, not the debt of the wife. In addition, the agreement was under seal and delivery by the wife to her attorney, in light of her testimony about her intentions regarding the dissolution proceedings, showed that she did not intend it to be binding upon her. As a result, the widow was entitled to dower.

A court does not have the power to effectuate a property settlement between a husband and wife in the absence of an actual agreement between the parties or proper pleadings.[191]

3. ENFORCEMENT

The violation of a property settlement agreement may not be met with the sanction of a contempt order, but only by the normal remedies of a creditor against his debtor.[192]

189. Gilbert v. Gilbert, 312 So. 2d 511 (Fla. 3d Dist. 1975).
190. 302 So. 2d 204 (Fla. 2d Dist. 1974).
191. McCready v. McCready, 301 So. 2d 804 (Fla. 4th Dist. 1974).
192. Carlin v. Carlin, 310 So. 2d 403 (Fla. 4th Dist. 1975).

VIII. CUSTODY AND SUPPORT OF CHILDREN

A. *Custody*

1. JURISDICTION

A Florida court will not have jurisdiction over a minor nonresident child even though the court has jurisdiction over both parents in a dissolution of marriage action.[193]

2. CRITERIA FOR THE AWARD

In *Lippincott v. Lippincott*,[194] a dissolution of marriage judgment awarded the custody of six children to their father "pending receipt by the court of the report from Family Services, State Welfare Department, the final award of custody to abide the recommendation therein set forth."[195] Nine months later the report was received by a successor trial court judge. The report recommended the continued custody of two of the children with their father and that custody of the remaining four children should be awarded to the mother. The successor judge did not follow this recommendation, however, but awarded custody of all six children to their father. The appellate court held that the successor trial court judge was not bound to follow her predecessor's decision to abide by the recommendations of the Family Services report.

Section 61.20 of the Florida Statutes, which authorizes the use of confidential reports from counselors of the Juvenile and Family Division of the Circuit Court in family law matters was subjected to a stinging attack by Chief Judge Owen of the District Court of Appeal, Fourth District, on the grounds that these reports are violative of the due process rights of the parties. Judge Owen argued that the parties are unable to test the credibility or qualifications of the court counselor, the basis upon which the recommendations are made, or the credibility or reliability of any of the alleged factual matters set forth in the report.[196]

It is proper for a trial court to award custody of a minor child to his grandparent, rather than to his mother, when it is in the best interests of the child, and when the alternative would be to give

193. Reinhart v. Reinhart, 291 So. 2d 103 (Fla. 1st Dist. 1974); *see* Yelton v. Yelton, 295 So. 2d 119 (Fla. 4th Dist. 1974) which held that when the child is not within the state it is "erroneous" to grant custody to the mother who never appeared in the action.

194. 287 So. 2d 144, 145 (Fla. 3d Dist. 1973).

195. *Id.*

196. Green v. Green, 307 So. 2d 247 (Fla. 4th Dist. 1975).

custody to the mother who was divorced from her third husband, working and dating other men and had failed to indicate stability in "her past lifestyle."[197]

When both parents are equally fit to have custody of twin daughters two and one-half years old, and when the children have always been taken care of by baby-sitters because both parents have been employed, it is not error for the trial court to award custody to the father and to order the mother to contribute $25.00 per week towards their support. There "should be no conclusive presumption that children of tender years must always be placed in the custody of the mother."[198]

Under section 61.13(2) of the Florida Statutes, the mother of very young children should receive "prime consideration for custody, providing all else is equal. However, there is no conclusive presumption that the mother is entitled to custody, even where everything else is equal."[199]

In a somewhat confused opinion, the Supreme Court of Florida has seemed to indicate that section 61.13(2) of the Florida Statutes, which provides for equal consideration of the father and mother in the awarding of custody, is not inconsistent with the older case law in Florida which established that other things being equal, the mother of infants of tender years is best fitted to have custody.[200]

It is not error for a trial court to hear expert opinion testimony from an investigator with the domestic relations staff of the court as to which parent should have custody.[201]

Section 39.10 of the Florida Statutes provides that in all cases where one or both of the parents of a child is unable or unfit to be awarded custody and the child has a close relative who is fit, ready, able and willing to be awarded custody, the court shall award the custody of the child to such close relative and not to any foster home or agency of the state. The District Court of Appeal, First District, has applied this statute to a case where the mother and alleged father of an illegitimate child delivered the child to the Home Society and signed forms committing the child for adoption in behalf of the maternal grandparents who sought custody. The Home So-

197. Brannan v. Brannan, 284 So. 2d 701 (Fla. 1st Dist. 1973).

198. Anderson v. Anderson, 289 So. 2d 463, 464 (Fla. 3d Dist. 1974), *aff'd*, 309 So. 2d 1 (Fla. 1975).

199. Goodman v. Goodman, 291 So. 2d 106 (Fla. 3d Dist. 1974).

200. Anderson v. Anderson, 309 So. 2d 1 (Fla. 1975), *aff'g* 289 So. 2d 463 (Fla. 3d Dist. 1974).

201. Goodman v. Goodman, 291 So. 2d 106 (Fla. 3d Dist. 1974).

ciety strenuously contested the application of the statutes and asserted that the grandparents had no standing to seek custody after the natural parents had relinquished it. The child having lived with the maternal grandparents for ten months, the court apparently "stretched" the statute in order to achieve a just result.[202] Of course, unless the natural parents are found to be unfit, permanent custody may not be awarded to the grandparents.[203] A court may, however, award custody of a child to its mother and the maternal grandparents when the court believes that the grandparents "might play a significant role in assisting to bring about a better domestic environment for the child."[204]

A child's preference may be considered by a court in awarding custody, but the court is not required to consider it or even to question the child regarding his preference.[205]

The "moral unfitness" of the mother who committed adultery while the child was in the house does not necessarily make her an unfit mother. Whether the adultery had a direct bearing on the welfare of the child is a question of fact for the trier of fact.[206]

3. DIVIDED CUSTODY

The District Court of Appeal, Third District, has seemingly frowned upon child custody orders which in effect provide for divided custody.[207] In a subsequent case it rejected a father's contention that he ought to be granted custody during the summer in order to send his children to a private school of which he was headmaster. The father cited authority which had permitted divided custody, "[b]ut, unquestionably, split custody decrees, particularly for children of tender years, are not encouraged."[208]

4. PROCEDURAL QUESTIONS

A court may temporarily commit children in an emergency situation to the custody of the Division of Family Services for suitable

202. *In re* R.J.C., 300 So. 2d 54 (Fla. 1st Dist. 1974). *See also* Van Meter v. Murphy, 287 So. 2d 740 (Fla. 1st Dist. 1974).

203. Besade v. Besade, 312 So. 2d 484 (Fla. 3d Dist. 1975).

204. Forman v. Forman, 315 So. 2d 9 (Fla. 3d Dist. 1975).

205. Kitchens v. Kitchens, 305 So. 2d 249 (Fla. 3d Dist. 1975).

206. Dinkel v. Dinkel, No. 46, 764 (Fla. Sup. Ct. Aug. 14, 1975) *rev'g* 305 So. 2d 90 (Fla. 1st Dist. 1974).

207. Jacobs v. Jacobs, 304 So. 2d 542 (Fla. 3d Dist. 1974).

208. Peterseil v. Peterseil, 307 So. 2d 498 (Fla. 3d Dist. 1975); *accord*, Unger v. Unger, 206 So. 2d 540 (Fla. 3d Dist. 1975).

foster home placement on the grounds that the children are dependent as a result of the neglect of their mother, "without a noticed hearing"[209] and in advance of a later hearing at which time the mother is given an opportunity to appear.

It would appear that there is no requirement for a trial court to appoint an attorney to represent an allegedly indigent mother in a child custody action brought by the father.[210]

The due process and equal protection clauses of the fourteenth amendment do not require that indigent parents named as respondents in child dependency proceedings or their children be advised of their rights to counsel. Nor does it require that the state supply counsel. Furthermore, if the parents have voluntarily relinquished their rights to custody, the proceedings are not adverse and in non-adversary proceedings there is no necessity for the appointment of counsel.[211]

A county in Florida is not required by law to pay the cost of publication for an indigent parent who wishes to change the names of his minor children when the parent cannot obtain personal service of process upon the other parent.[212]

5. FOREIGN JUDGMENTS

Although a Florida court is not required to give full faith and credit to a foreign judgment awarding custody of children to a parent, the court may enforce the judgment under the principles of comity when the court finds that it is in the best interest of the children to do so.[213]

6. VISITATION RIGHTS

It is error for a court in its final judgment to condition a parent's right of visitation upon timely payment of support.[214]

An order granting weekend visitation rights to paternal grandparents, when exclusive custody of a child has been granted to the mother, "is unjustified and unenforceable."[215]

209. Sedberry v. State, 286 So. 2d 237, 238 (Fla. 1st Dist. 1973).

210. Richter v. Richter, 307 So. 2d 849 (Fla. 1st Dist. 1975). It should be noted that neither the mother nor her attorney furnished proof of her indigence.

211. Potvin v. Keller, 299 So. 2d 149 (Fla. 3d Dist. 1974).

212. Dade County v. Womack, 285 So. 2d 441 (Fla. 3d Dist. 1973).

213. Mitchell v. Mitchell, 294 So. 2d 44 (Fla. 3d Dist. 1974).

214. Chaffin v. Grigsby, 293 So. 2d 404 (Fla. 4th Dist. 1974).

215. Rodriguez v. Rodriguez, 295 So. 2d 328, 329 (Fla. 3d Dist. 1974).

A trial court may not alter visitation rights upon the oral motion of one of the parties; written pleadings are required.[216]

In the absence of an emergency affecting the welfare of the children, a trial court may not modify visitation privileges granted to a former husband in a final judgment of dissolution of marriage, in the absence of any pleadings filed by the former wife.[217]

When a dissolution judgment provides that the father should have "all reasonable rights of visitation with said minor children,"[218] and the wife, with permission of the court, then moves to a foreign state, she is not required by this language to permit her former husband to take the children from the foreign state to Florida to visit him for a period of weeks. If the father should desire to have his children visit him in Florida, he should seek modification of the judgment in appropriate proceedings.

7. MODIFICATION OF CUSTODY

A circuit court of one county is without jurisdiction to modify the final judgment of another county as to child custody and visitation rights,[219] and the court which makes the original judgment governing custody has continuing jurisdiction to modify it; a writ of prohibition will lie to prevent the circuit court in another county from taking jurisdiction.[220]

It is reversible error for a trial court to dismiss a case on the grounds of forum non conveniens when a child custody decree sought to be modified is a Florida decree in which the court retained jurisdiction, even though neither parent is now a resident of Florida. The doctrine of forum non conveniens should be limited to those cases in which both parties are nonresidents and the cause of action accrued in a foreign jurisdiction.[221]

An order changing an award of custody need not contain a finding that the prior custodian is now unfit to have custody; negative factors in the prior custodian's life plus new additional needs of the child and an increased ability to provide for support by the other parent will be sufficient to justify a change of custody.[222]

A trial court need not make specific findings that the parent

216. Purvis v. Carver, 303 So. 2d 681 (Fla. 4th Dist. 1974).
217. Childress v. Childress, 309 So. 2d 581 (Fla. 3d Dist. 1975).
218. Kranis v. Kranis, 313 So. 2d 135, 136 (Fla. 3d Dist. 1975).
219. Ward v. Wells, 298 So. 2d 493 (Fla. 1st Dist. 1974).
220. Wells v. Ward, 314 So. 2d 138 (Fla. 1975).
221. Morgan v. Ande, 313 So. 2d 86 (Fla. 4th Dist. 1975).
222. Jayne v. Dennison, 284 So. 2d 237 (Fla. 2d Dist. 1973).

who was originally awarded custody has become unfit, that there has been a material change in conditions, or that the best interests of the child would be accomplished by a change in custody.[223] Another court has opined, however, that in order to uphold an order changing custody from one parent to the other it is necessary to show not only a substantial change in conditions since the entry of the original order but also that the change will promote the welfare of the child.[224]

When the evidence shows that a divorced woman has shared her apartment overnight with various men while her children were present; that she has suffered from emotional instability and was hospitalized with a nervous breakdown; that the children have changed for the worse in recent months and the trial court has taken custody of her children from her and awarded it to the former husband, it cannot be said that the change was based solely upon the fact that the woman was planning to marry a black man.[225]

If the facts show that a former wife is living in adultery with a married man (who was separated from his wife) and that the children of the former wife are aware of what is transpiring, this is sufficient justification for a court to modify a former child custody award and to grant custody to the father.[226]

In order to support an order modifying an award of custody it is necessary to show a substantial or material change in facts since the rendition of the original order. Allegations that the former husband has since retired and can spend more time with his children, that they have been living with him since the original order and desired to continue to do so, and that the children while living with the mother were obliged to awaken early in the morning because of her employment thus interfering with their sleep and causing them to do poorly in school, were not sufficient to justify a change.[227]

Visitation rights granted in a dissolution judgment may be modified in subsequent proceedings even in the absence of a specific prayer for this relief when the facts show that the emotional conflict between the parties has affected the children and the protection of the interests of the children requires this relief.[228]

223. Goodman v. Goodman, 291 So. 2d 106 (Fla. 3d Dist. 1974).

224. Nicholson v. Nicholson, 311 So. 2d 676 (Fla. 4th Dist. 1975); Spradley v. Spradley, 312 So. 2d 215 (Fla. 1st Dist. 1975).

225. Niles v. Niles, 299 So. 2d 162 (Fla. 2d Dist. 1974).

226. Young v. Young, 305 So. 2d 92 (Fla. 1st Dist. 1974).

227. Avery v. Avery, 314 So. 2d 198 (Fla. 1st Dist. 1975).

228. Giacoio v. Giacoio, 286 So. 2d 225 (Fla. 3d Dist. 1973).

The District Court of Appeal, Second District, has held that a change of custody from the father to the mother may be ordered when the record in the first case showed that all the children (whose ages ranged from 11-15) desired to live with their mother rather than with their father who had used an authoritarian attitude and improper inducements (gifts and promises of gifts) to induce the children to express a desire to stay with him.[229] In a second case, the child expressed a desire to stay with his father; however, the appellate court awarded custody to the mother on the ground that the child's desires may have been improperly influenced by a lavish supply of material things given to him by his father.[230] Compare these cases with *Kitchens v. Kitchens*[231] which holds that a court need not consider the child's wishes in awarding custody in the first instance.

Administrative Order No. 73-15 of the Circuit Court for the Eleventh Judicial Circuit, which authorizes the referral of "post-decretal matters involving child support, maintenance and alimony" to an appointed General Master, does not encompass a case involving the question of modification of custody. Further, it would be improper to refer objections made to the General Master's Report to a Special Master if this constituted an abdication of responsibility by the trial court.[232]

8. LEGISLATION

A new provision was added to section 61.13 of the Florida Statutes to provide that in any custody proceeding brought under chapter 61, the court has jurisdiction over children who are physically present in Florida at the time of the filing of the proceedings, if it shall appear that the children were "removed from this state for the primary purpose of removing the said child or children from the jurisdiction of the court in any attempt to avoid a determination of custody."[233]

A new subsection has been added to section 61.13 of the Florida Statutes to delineate the factors which a trial court judge should consider in child custody matters. This amendment is, at best, a redundant restatement of case law, and, at worst, a trap for the unwary trial court judge if he fails to make mention of each of the

229. Taylor v. Schilt, 292 So. 2d 47 (Fla. 2d Dist. 1974).

230. Gregory v. Gregory, 292 So. 2d 50 (Fla. 2d Dist. 1974).

231. 305 So. 2d 249 (Fla. 1st Dist. 1974). *See* note 205 *supra* and accompanying text.

232. Bell v. Bell, 307 So. 2d 911 (Fla. 3d Dist. 1975).

233. Fla. Laws 1975, ch. 75-67, *amending* FLA. STAT. §§ 61.13(1), 61.14(1), *creating* 61.13 (2)(a) (1974).

standards in writing his custody order. If the trial court judge recites this litany of standards, he will likely prepare an appeal-proof order.[234]

B. *Support*

1. JURISDICTION

When a father is on active duty in the military and the mother secures a foreign order modifying a previous child support award without any attempt to comply with the pertinent provision of the Soldiers' and Sailors' Civil Relief Act of 1940,[235] the order is not void but only voidable at the instance of the serviceman if he is able to show prejudice by reason of his military service in making a defense and that he has a meritorious or legal defense to the action. Further, when the mother brings suit in Florida to secure a domestic judgment for arrearages accruing from nonpayment under this foreign order, the foreign order is entitled to full faith and credit in Florida unless it is subject to modification for accrued amounts in the state which entered the order.[236]

A court has no power to order a father to pay child support "until the child reaches the age of twenty-one (21) or completes or discontinues his college education, whichever shall first occur," unless the father has entered into an agreement to this effect.[237]

2. DISCOVERY

The District Court Of Appeal, Third District, has slightly modified the rule of *Birge v. Simpson*,[238] by holding that although a successive spouse's financial position is discoverable as material and relevant to the ability of a child's natural parent to fulfill his or her duty of support, this discovery can be conducted only upon a "clear and convincing showing that the remarried parent is unable to discharge the duty to provide for the needs of the child out of her or his own funds."[239]

3. AMOUNT

An award of $112.50 per week as support and alimony for a wife

234. Fla. Laws 1975, ch. 75-99, *creating* FLA. STAT. § 63.13(3) (1975).
235. 50 U.S.C. APP. § 520 (1970).
236. Courtney v. Warner, 290 So. 2d 101 (Fla. 4th Dist. 1974).
237. Kowalski v. Kowalksi, 315 So. 2d 497, 498 (Fla. 2d Dist. 1975).
238. 280 So. 2d 482 (Fla. 3d Dist. 1973).
239. Condon v. Condon, 295 So. 2d 681, 683 (Fla. 3d Dist. 1974).

and three children ages 2, 3 and 5, to be paid by the father who is earning $70,000 per year, is erroneous as being too small.[240] Conversely, the District Court of Appeal, Third District, has held that a child support award of $200 per month for one 18 year old child is excessive when the wife was awarded $300 per month and the husband has a net take home pay of $1,000 per month. The child support awarded was reduced to $100 per month.[241]

4. MODIFICATION OF SUPPORT

The allegations of a father that he did not have the advice of counsel when he entered into a child support agreement and that he thereby had agreed to pay too much child support are totally inadequate grounds for modification.[242]

It has been held that section 61.14 of the Florida Statues is broad enough to enable a circuit court of the county in which one of the parties to a former marriage resides to modify a judgment providing for child support payments which was entered by the court in a different county over the protestations that the venue is improper. Further, a petition to modify the support judgment may be served upon the other party even though the proceedings are instituted in a county other than the one which rendered the original order, and this will confer jurisdiction over the person "served."[243]

In the absence of extraordinary circumstances, unpaid child support payments constitute a vested right which are not subject to retroactive modification.[244]

It is reversible error for a trial court to change the date of termination of a previous child support award when this fact was neither raised in the pleadings nor touched upon in any way in proceedings brought to increase the amount of the award.[245]

The Supreme Court of Florida, in a cloudy opinion,[246] has approved the decision in *Finn v. Finn*[247] by holding that section 743.07 of the Florida Statutes was not to be given a retroactive effect so as to affect support orders entered prior to July 1, 1973, the effective date of the Act. Further, the court disapproved the holding in *White*

240. Arnold v. Arnold, 292 So. 2d 384 (Fla. 3d Dist. 1974).
241. Nevins v. Nevins, 305 So. 2d 63 (Fla. 3d Dist. 1975).
242. Hicks v. Hicks, 313 So. 2d 64 (Fla. 4th Dist. 1975).
243. Sikes v. Sikes, 286 So. 2d 210 (Fla. 1st Dist. 1973).
244. Teta v. Teta, 297 So. 2d 642 (Fla. 1st Dist. 1974).
245. Roberts v. Costanza, 302 So. 2d 780 (Fla. 1st Dist. 1974).
246. Finn v. Finn, 312 So. 2d 726 (Fla. 1975).
247. 294 So. 2d 57 (Fla. 3d Dist. 1974).

v. White[248] and held that a father (in accordance with subsection 3 or section 743.07) may be held liable for the support of his children after majority and while they are undergraduate college students. The concept of dependency is not limited to physical or mental disability, but may extend to children who are financially dependent upon their parents for a college education. The court seemed to limit the parents' liability to the period extending between ages 18 and 21. This decision has been interpreted by the District Court of Appeal, Fourth District, to mean that a court has no power to order a parent to support his 23 year old son who is a college student in the absence of any mental or physical deficiency.[249] The reader is cautioned that a 1975 legislative amendment may possibly limit the application of the *Finn* rule that a parent may be liable for the support of his adult children who are in college.[250]

The District Court of Appeal, Fourth District, has held that when a property settlement agreement used such words as "minority," "coming of age," and "attained majority by age or marriage,"[251] it is proper for a court to terminate child support when the children reach the age of eighteen even though the age of majority at the time of the signing of the agreement was twenty-one. The result would have been different however, if the agreement had given a stated age.

The District Court of Appeal, First District,[252] has refused to follow the lead of the Third District,[253] and has held that there is no basis for a trial court to order a parent to pay child support retroactively to a date prior to the filing of the complaint.

It is reversible error for a trial court to modify child support provisions of a decree of dissolution of marriage in the absence of any pleadings requesting this modification.[254]

In reversing the decision in *Small v. Small*,[255] the Supreme

248. White v. White, 296 So. 2d 619 (Fla. 1st Dist. 1974). The supreme court in *Finn* also effectively overruled Ruttnau v. Ruttnau, 299 So. 2d 61 (Fla. 1st Dist. 1974), Smith v. Smith, 309 So. 2d 615 (Fla. 1st Dist. 1975), French v. French, 303 So. 2d 668 (Fla. 4th Dist. 1974), while apparently approving Field v. Field, 291 So. 2d 654 (Fla. 2d Dist. 1974) and Ackerly v. Ackerly, 296 So. 2d 66 (Fla. 2d Dist. 1974). *See also* Daugherty v. Daugherty, 308 So. 2d 24 (Fla. 1975).

249. Briggs v. Briggs, 312 So. 2d 762 (Fla. 4th Dist. 1975); *accord*, Kartub v. Kartub, 312 So. 2d 815 (Fla. 4th Dist. 1975).

250. *See* note 261 *infra* and accompanying text.

251. Dalton v. Dalton, 304 So. 2d 511 (Fla. 4th Dist. 1974).

252. Warren v. Warren, 306 So. 2d 197 (Fla. 1st Dist. 1975).

253. Weinstein v. Weinstein, 148 So. 2d 737 (Fla. 3d Dist. 1963); *accord*, Friedman v. Friedman, 307 So. 2d 926 (Fla. 3d Dist. 1975).

254. DeWalt v. DeWalt, 305 So. 2d 792 (Fla. 4th Dist. 1975).

255. 313 So. 2d 749 (Fla. 1975), *rev'g* 299 So. 2d 179 (Fla. 4th Dist. 1974).

Court of Florida has held that a trial court's denial of a father's petition for modification of the alimony and support provisions of a dissolution judgment on the grounds that the father has failed to prove sufficient facts to justify a modification is a final judgment (rather than an interlocutory one), and that a motion for rehearing tolled the running of the time for appeal until it was disposed of.

It is reversible error to make an apportionment between alimony and child support retroactive to a time prior to the filing of a former wife's motion for apportionment; the apportionment should not be retroactive prior to the date of the filing of the motion because the husband would have "a vested interest" for tax purposes until the apportionment became effective.[256]

A court under the Uniform Reciprocal Enforcement of Support Law is strictly limited to the determination of the duty of support, and it cannot terminate this duty because the mother has refused to allow the father to visit his children.[257]

5. MISCELLANEOUS

It is not an abuse of discretion for a trial court to award to the wife as child support for children ages 10 and 13 the exclusive use of the marital home for a period of five years. At the end of this period the wife would be free to seek modification by asking for continued use of the home if it was needed for the children.[258]

A father has an obligation to support his children in spite of the fact that his wife has obtained a foreign divorce judgment against him.[259]

Furthermore, a father may be compelled to maintain life insurance on his own life for the benefit of his minor children and to maintain medical and dental insurance for the children on the basis that these insurance policies can be considered as security for the payment of support and medical expenses.[260]

6. LEGISLATION

Sections 61.13(1) and 61.14(1) of the Florida Statutes have been amended to provide that the courts have the power to modify support orders and property settlement provisions dealing with child support when the subject child or children reach the age of 18. The

256. Schalk v. Schalk, 312 So. 2d 465 (Fla. 4th Dist. 1973).
257. Vecellio v. Vecellio, 313 So. 2d 61 (Fla. 4th Dist. 1975).
258. Rowles v. Rowles, 299 So. 2d 641 (Fla. 1st Dist. 1974).
259. Ciociola v. Ciociola, 302 So. 2d 462 (Fla. 3d Dist. 1974).
260. Moore v. Moore, 311 So. 2d 152 (Fla. 3d Dist. 1975).

amendment makes no mention of the subject of college education, but it does appear to have a retroactive effect in the sense that the amendments seem to apply to orders and agreements in existence prior to the effective date of the act.[261]

IX. ADOPTION

Foster parents who have gained custody of a child by the consent of the mother, who falsely assumed the last name of the foster parents during childbirth, and who had the birth certificate falsely executed showing the foster parents to be the natural parents, have standing to contest a commitment action brought by the Florida Department of Health and Rehabilitative Services.[262]

In the absence of the natural father's consent to an adoption or evidence that he has abandoned his child, a court is not warranted in granting adoption to a stepfather, even though he is able to give greater economic support than can the natural father.[263]

Former section 39.11 (5) of the Florida Statutes provided that notice of adoption proceedings had to be given to the natural parents unless it was waived by their executing "before two witnesses and a notary public . . . , a written surrender of the child to a licensed child placing agency . . . ." The District Court of Appeal, Second District, has decided that this statute does not require that there be two witnesses and a notary public but can be satisfied by two witnesses, one of whom is a notary public.[264] Virtually the same language of former section 39.11(5) can now be found in the new Adoption Act.[265]

A complaint for invasion of privacy brought by the adoptive parents of a child against a newspaper for publishing a detailed description of the adoption proceedings does not state a cause of action when it fails to allege that the newspaper obtained its information from confidential court files or the confidential files of the Department of Health and Rehabilitative Services or a licensed child-placing agency, all of which are confidential under section 63.181 of the Florida Statutes.[266]

Any abandoned child who has been placed in a foster home may

261. Fla. Laws 1975, ch. 75-67, *amending* FLA. STAT. §§ 61.13(1), 61.14(1), *creating* § 61.13(2)(a) (1974).

262. *In re* K.S.K., 294 So. 2d 50 (Fla. 1st Dist. 1974).

263. La Follette v. Van Weelden, 309 So. 2d 197 (Fla. 1st Dist. 1975).

264. Willis v. Florida State Div. of Family Servs., 283 So. 2d 155 (Fla. 2d Dist. 1973).

265. FLA. STAT. § 63.012 (1973).

266. Jordan v. Pensacola News-Journal, Inc., 314 So. 2d 222 (Fla. 1st Dist. 1975).

now be adopted if after a period of one year a diligent search has failed to locate a parent or relative of the child.[267]

The Florida Adoption Act was amended to provide (among other things) that unless consent is excused by the court, the father of a minor must consent to the adoption when the minor is his child by adoption, or has been judicially established as his, or he has acknowledged in writing before a competent witness that he is the father of the minor and has filed such acknowledgment with the Bureau of Vital Statistics and he has provided the child with support "in a repetitive, customary manner." Further, no person except an agency or the division shall take or send a child out of Florida for placement for adoption unless the child is to be placed with a relative within the third degree or a stepparent.[268]

X. JUVENILES

A. *Dependent Children*

The Supreme Court of Florida has agreed with the District Court of Appeal for the Fourth District that a juvenile court does not have the power to order a parent of a delinquent child to participate in, and to cooperate with, a drug rehabilitation program.[269] However, as noted in the legislation subsection of this section, this case has been superseded by a new statute which gives the courts the power to require the cooperation of parents.[270]

The Supreme Court of Florida has held that section 39.11 (2)(a)(4) of the Florida Statues (which provides that a juvenile may be adjudicated to be a dependent child and committed for adoption when it has been abandoned by the natural parents, or they have substantially refused or neglected to give support although they are able to do so or they are unfit to have custody by reason of their conduct which is seriously detrimental to the welfare of the child) is neither unconstitutionally vague nor violative of fundamental due process.[271]

When the evidence clearly shows that a child is in a "grossly abnormal condition"[272] as the result of severe malnutrition, it is reversible error for the trial court to hold that the child is not a

267. Fla. Laws 1975, ch. 75-159, *amending* FLA. STAT. § 39.11(2)(d) (1975).

268. Fla. Laws 1975, ch. 75-226, *amending* FLA. STAT. ch. 63 (1974).

269. State v. S.M.G., 313 So. 2d 761 (Fla. 1975), *aff'g In re* S.M.G., 291 So. 2d 43 (Fla. 4th Dist. 1974).

270. *See* note 306 *infra*.

271. *In re* Camm, 294 So. 2d 318 (Fla.), cert. denied, 95 S. Ct. 121 (1974).

272. *In re* K.S.K., 294 So. 2d 50 (Fla. 1st Dist. 1974).

dependent child under section 39.01(10) of the Florida Statutes, which provides that a dependent child is one who does not have proper parental support and care and who is neglected as to medical or other care necessary for the well-being of the child.

The Supreme Court of Florida has held that the right to counsel in juvenile dependency proceedings must be determined on a case-by-case basis and that the criteria for offering counsel would include "at least (i) the potential length of parent-child separation, (ii) the degree of parental restrictions on visitation, (iii) the presence or absence of parental consent, (iv) the presence or absence of disputed facts, and (v) the complexity of the proceedings in terms of witnesses and documents."[273]

B. *Delinquency and Criminal Proceedings*

It is fundamental error for a court to try a juvenile for breaking and entering with intent to commit larceny before a referee rather than before a court, even if his public defender consents to this procedure.[274]

When a notice of criminal charges against an unmarried minor is mailed to his mother and subsequently returned unclaimed and the child is thereafter sentenced, the judgment and sentence must be reversed because of the failure of the record to show a compliance with section 925.07 of the Florida Statutes.[275]

If the statutory notice is sent to "123 North Linville, Westland, Michigan,"[276] instead of to the correct address of "123 North Linville, West Lane, Michigan,"[277] and the state produces neither a return receipt showing the receipt of the notice, nor any other proof that the minor's parents had actual knowledge of the charge, nor a showing that an appropriate state official asked the minor defendant to designate a relative or friend to receive the notice, then the judgment and sentence are void.

Under the common law, there is a rebuttable presumption that a child between the ages of 7 and 14 is legally incapable of committing a crime.[278] This presumption has been held applicable

273. Potvin v. Keller, 313 So. 2d 703, 706 (Fla. 1975), *citing* Cleaver v. Wilcox, 499 F.2d 940 (9th Cir. 1974).

274. H.P. v. State, 284 So. 2d 461 (Fla. 3d Dist. 1973).

275. Douglas v. State, 295 So. 2d 361 (Fla. 3d Dist. 1974). FLA. STAT. § 925.07 requires that notice be given to the parent or guardian if the name and address of such person are known, or, if the name and address are not known, that notice be given a friend or relative designated by the minor.

276. Thomas v. State, 301 So. 2d 487 (Fla. 2d Dist. 1974).

277. *Id.* at 488.

278. Clay v. State, 143 Fla. 204, 196 So. 462 (Fla. 1940).

to juvenile delinquency proceedings based upon a charge of manslaughter as defined under the criminal law.[279] If the evidence shows that a mentally and academically retarded child picked up a gun (which he thought was unloaded) and discharged it, killing a playmate, and there was no evidence showing any motive for the shooting, the charges against the child should have been dismissed when the state failed to offer any evidence to overcome the presumption of incapacity.[279]

In a consistent vein, if the state, in delinquency proceedings brought against a 9-year-old boy for participating in breaking into a store and stealing a television set worth less than $100, should fail to present any evidence of the capacity of the child to commit a crime, then the proceedings must be dismissed.[280]

It has been held to be reversible error for a court to adjudicate a minor as a delinquent child upon the grounds that she committed an assault and battery upon two police officers and that she resisted arrest when the facts showed that there was no justified cause for arrest and that an arrest was never made.[281] The two officers attempted to remove the minor girl from a closet in her own home because of a request by the girl's mother.

When juvenile delinquency charges based upon three armed robberies have been dismissed by the juvenile court because of a violation of the speedy trial rule,[282] the alleged delinquent cannot later be indicted by a grand jury for the same offenses and the indictments must be dismissed.[283]

The Supreme Court of Florida has held that section 39.09(2) of the Florida Statues is not basically inconsistent with Rule 8.110(b)(6)(c), Florida Rules of Juvenile Procedure (Temporary) in so far as the requirements for the waiving of jurisdiction over juveniles accused of acts which would be crimes if they were adults is concerned. Therefore, the court reversed a decision invalidating the statute as unconstitutional in that it conflicted with the rule promulgated by the supreme court.[284]

Rule 8.100(b), Florida Rules of Juvenile Procedure, which provides that on demand the court shall waive juvenile jurisdiction and certify the case for trial as if the child were an adult, is mandatory

279. *In re* E.P., 291 So. 2d 238 (Fla. 4th Dist. 1974).

280. State v. D.H., 309 So. 2d 601 (Fla. 2d Dist. 1975).

281. E.A.S. v. State, 291 So. 2d 61 (Fla. 1st Dist. 1974).

282. FLA. R. CRIM. P. 3.191(a)(1).

283. State *ex rel.* Kelly v. Rawlins, 289 So. 2d 444 (Fla. 2d Dist. 1974).

284. Davis v. State, 297 So. 2d 289 (Fla. 1974), *followed in In re* C.H.H., 298 So. 2d 208 (Fla. 1st Dist. 1974).

upon timely demand of the juvenile because article I, section 22 of the Constitution of Florida provides that the right to jury trial shall be secure to all and article I, section 15(b) provides that "any child so charged shall, upon demand made as provided by law . . . , be tried to an appropriate court as an adult."[285]

A juvenile may waive his *Miranda* rights. If the facts show that a 15-year-old tenth-grade male juvenile of average maturity and intelligence was advised of all his rights (according to his own in-court testimony), he may have his confession to the crime of arson introduced against him.[286]

In the trial of a juvenile charged as a delinquent child for the act of murder, the judge's conclusion that the juvenile's confession is voluntary "must appear from the record with unmistakable clarity."[287] A mere statement that the child's motion to suppress the confession in the cause is denied is not enough.

Section 39.03(3) of the Florida Statutes provides that the person taking a child into custody (for acts of delinquency) "shall, without delay for the purpose of investigation or any other purpose, deliver the child, by the most practicable route, to the court of the county or district where the child is taken into custody." As a result, if the police interrogate a juvenile regarding a charge of rape and he confesses to the crime before the police deliver him to a judge, this confession is inadmissible.[288]

A nolo contendere plea of a minor will be remanded when the record does not show that the court made any determination that it had been made voluntarily and with an understanding of the nature of the allegations.[289]

Moreover, a confession which is obtained as the result of promises is invalid. Thus, when a juvenile confesses as the result of the policeman promising that he would not be prosecuted for other offenses, the confession is invalid.[290]

C. *Speedy Trial Rule*

When a juvenile is arrested and the juvenile court decides to waive jurisdiction in order that the accused may be tried as an adult, he must be tried within 180 days of his arrest or be discharged

285. State v. Williams, 304 So. 2d 472 (Fla. 2d Dist. 1974).
286. T.B. v. State, 306 So. 2d 183 (Fla. 2d Dist. 1975).
287. Husk v. State, 305 So. 2d 19, 20 (Fla. 1st Dist. 1974).
288. Roberts v. State, 285 So. 2d 385 (Fla. 1973).
289. G.M.K. v. State, 312 So. 2d 538 (Fla. 2d Dist. 1975).
290. M.D.B. v. State, 311 So. 2d 399 (Fla. 4th Dist. 1975).

under the speedy trial rule;[291] the time begins to run from the arrest and not from the time that jurisdiction is waived.[292]

A congested trial calendar resulting from an overworked judge is not an exceptional circumstance which excuses the failure to try a juvenile within 90 days as provided for in Rule 8.120, Florida Rules of Juvenile Procedure and 3.191(f) Florida Rules of Criminal Procedure, and, as a result, the delinquency charges must be dismissed.[293]

D. *Legislation*

Juvenile traffic offenses have been defined as violations, by a child, of a state or local ordinance governing the use of motor vehicles with the following exceptions: (a) fleeing a police officer, (b) leaving the scene of an accident which involves death or personal injuries, or (c) driving while under the influence of alcohol, narcotic drugs, barbiturates, or other stimulants.[294]

The "Interstate Compact on Placement of Children" has been enacted to provide that children may be sent to or received for placement from states which join the compact. Placement is defined as the arranging for the care of a child in a "family free or boarding home or in a child-caring agency or institution,"[295] and placement can include delinquent as well as dependent children.

Section 39.26 of the Florida Statues was amended to provide for the Governor of Florida to enter into an "out-of-state confinement compact" with other states to provide for the confinement of juvenile probationers, parolees, escapees and abscondees between the various states which enter into this compact.[296]

Child care facilities (which would seem to include primarily non-public or church-related day care nurseries which do not come within the ambit of chapter 232 of the Florida Statutes) must now be licensed and comply with standards set by the Child Care Advisory Council of the Department of Health and Rehabilitative Services.[297]

Courts which have jurisdiction over traffic offenses now have

291. FLA. R. CRIM. P. 3.19(a)(1).

292. Benton v. State, 307 So. 2d 198 (Fla. 2d Dist. 1975); *accord*, Boatman v. State, 306 So. 2d 592 (Fla. 2d Dist. 1975).

293. State v. *In re* J.H., 295 So. 2d 698 (Fla. 1st Dist. 1974).

294. FLA. STAT. § 316.045 (Supp. 1974).

295. FLA. STAT. § 409.401 (Supp. 1974).

296. FLA. STAT. § 39.26 (Supp. 1974).

297. FLA. STAT. § 402.305 (Supp. 1974).

jurisdiction over any juvenile who does not hold a driver's license and who is charged with a non-criminal infraction.[298]

Section 39.03(2) of the Florida Statutes has been amended to provide that juveniles who are taken into custody may now be released into the custody of an adult (who is not related to the juvenile) approved by the court at a prior time as an authorized agent of the department to receive children for temporary placement. The court is required to review this placement within forty-eight hours, excluding Sundays and legal holidays.[299]

The child abuse laws were amended to provide (among other things) that the phrases "child abuse" or "maltreatment" include the concept of "sexual abuse." Also included is a provision that, although parents may not be guilty of child abuse if they withhold medical treatment because of their religious beliefs, this does not prevent a court from ordering medical treatment for a child,[300] by a practioner who relies solely on spiritual means for healing in accordance with the tenets and practices of a well recognized church or religious organization.

The child abuse statutes were amended to provide that any person who willfully or knowingly makes public or discloses any information contained in the child abuse registry or records may be held personally liable for damages to any person injured or aggrieved.[301]

Section 828.03 of the Florida Statutes, which provided that societies for the prevention of cruelty to children could appoint agents for the purpose of prosecuting those accused of cruelty to children, has been amended to provide that now the agents have only the power to investigate rather than prosecute.[302]

The child labor laws have been extensively amended and the central theme seems to be a lowering of minimum ages for employment.[303]

The Department of Education has been statutorily directed to establish 18 regional diagnostic and resource centers for exceptional students in 18 different Florida counties.[304]

The Department of Health and Rehabilitative Services was ex-

298. Fla. Laws 1975, ch. 75-183, *amending* FLA. STAT. § 316.045(2), (Supp. 1974).

299. Fla. Laws 1975, ch. 75-198, *amending* FLA. STAT. § 39.03(2) (1973).

300. Fla. Laws 1975, ch. 75-185, *amending* FLA. STAT. § 827.07 (Supp. 1974).

301. Fla. Laws 1975, ch. 75-101, *amending* FLA. STAT. § 827.07(11) (Supp. 1974).

302. Fla. Laws 1975, ch. 75-223, *amending* FLA. STAT. § 823.03 (1973).

303. Fla. Laws 1975, ch. 75-195, *amending* FLA. STAT. § 450.11, 450.021, 232.07, 450.061, 450.081, 450.11, 460.151, 450.161 & 232.08 (1973).

304. Fla. Laws 1975, ch. 75-69, *amending* FLA. STAT. § 229.832 (Supp. 1974).

tensively reorganized and in the process the term "child in need of supervision" was deleted from the statutes; runaway children and truant children were included within the definition of dependent children; a definition of an "ungovernable child" was added; procedures were added for detention hearings with regard to children who have been twice adjudicated to be delinquent and who are charged with a third act of delinquency which involves a felony, etc. Space limitations do not permit any detailed discussion of this lengthy act.[305]

Section 39.11 of the Florida Statutes was amended to state that courts may now order the natural parents or legal guardian of a child adjudicated dependent, delinquent, or in need of supervision to participate in family counselling and other professional counselling activities deemed necessary for the rehabilitation of the child.[306]

Any court having jurisdiction over a delinquent child now has the power to order the child to make restitution for the damage or loss caused by his offense "in a reasonable amount or manner to be determined by the court. The court may require the clerk of the circuit court to be the receiving and dispensing agent."[307] Query: Does this statute prevent an injured person from suing the child in a civil action? Does this statute take away the injured person's right of trial by jury in an action against the child? Did the draftsmen realize that they were merging the civil law into a quasi-criminal law system?

XI. GUARDIANSHIP

A. *Incompetency Proceedings*

1. JURISDICTION

A court lacks guardianship jurisdiction over a minor who is not domiciled in, or a resident of, the state and who was present in the state for only a brief period while he was hospitalized as the result of an airplane crash.[308]

A committing judge in an incompetency proceeding has the power to discharge the alleged incompetent without appointing an examining committee, and this is especially true when he discovers that the proceeding was instituted by a disgruntled ex-boyfriend for malicious purposes.[309]

305. Fla. Laws 1975, ch. 75-48, *amending* FLA. STAT. § 20.04(3) (Supp. 1974).
306. Fla. Laws 1975, ch. 75-114, *amending* FLA. STAT. § 39.11(8) (Supp. 1974).
307. Fla. Laws 1975, ch. 75-135, *creating* FLA. STAT. § 39.11(3)(f) (Supp. 1974).
308. Junco v. Suarez-Solis, 294 So. 2d 334 (Fla. 3d Dist. 1974).
309. Meredity v. McNeal, 308 So. 2d 179 (Fla. 1st Dist. 1975).

A trial court has jurisdiction to enter an order authorizing guardians of the person to take such steps as they believe appropriate and necessary to prevent certain persons from communicating with an incompetent or entering his apartment.[310] It is interesting to speculate as to what the guardians could do to "take such steps" to prevent persons (who have not been enjoined) from doing these acts.

A court does have the power to commit persons to the custody of the Division of Retardation of the Department of Health and Rehabilitative Services, but the court does not have the power to dictate the kind of treatment or to supervise the treatment and placement of these persons.[311]

When an order of incompetency was entered without notice to the alleged incompetent or his brother who had custody of the alleged incompetent, and the only notice which was given was to the alleged incompetent's former attorney who had advised the court that he no longer represented him, the order of incompetency was set aside. The case was remanded to the trial court for an entry of an order under Rule 1.540 of the Florida Rules of Civil Procedure which will provide the alleged incompetent with an avenue for direct appeal of the order.[312]

2. VENUE

The proper venue for guardianship proceedings is in the county in which the incompetent has been a resident, and when a court has taken jurisdiction over his person and property, a court of another county should not attempt to assume jurisdiction because the proper venue remains with the original county.[313]

3. LIENS FOR CARE

When the state of Florida institutes guardianship proceedings involving an incompetent who is placed in a state mental hospital, and who is subsequently transferred to a private nursing home at the request of the state which was directed by the court to select the home, effect the ward's transfer, and "secure and guarantee payment"[314] for her care, and the nursing home relied upon these acts

310. *In re* McIntosh, 296 So. 2d 583 (Fla. 4th Dist. 1974).

311. Department of Health and Rehabilitative Servs. Div. of Retardation v. Owens, 305 So. 2d 314 (Fla. 1st Dist. 1974).

312. Smith v. Garst, 289 So. 2d 774 (Fla. 2d Dist. 1974).

313. Benedict v. Foster, 300 So. 2d 8 (Fla. 1974).

314. *In re* Irving, 297 So. 2d 331, 334 (Fla. 2d Dist. 1974).

of the state and rendered services to the ward, the state is estopped to claim a lien against the ward's assets for hospital services rendered when the private nursing home also is claiming compensation and the ward's assets are insufficient to pay both claimants.

B. *Legislation*

Mental Health Boards are now required to have at least one physician or psychiatrist as a member.[315]

The Florida Gifts to Minors Act was amended to add credit unions to the list of financial enterprises in which minors may have an interest as the result of gifts.[316]

The guardianship laws were extensively amended to provide (among other things) that the guardian must honor an adult ward's reasonable preferences as to the ward's place of domicile and standard of living; that the court is to give consideration to the ward's preferences in the appointment of a guardian; that bond may be waived in voluntary guardianship proceedings and that the guardian may now dissent from a will or exercise any other choice that the ward might exercise without court order. Space limitations preclude a complete analysis of these amendments.[317]

XII. ILLEGITIMACY

A. *Generally*

In a paternity action, jurisdiction cannot be acquired by constructive service by publication on the defendant.[318]

An insurance policy which contains an acknowledgement by the insured in the presence of a competent witness that the insured is the father of children, is a sufficient acknowledgement under section 731.29(1) of the Florida Statutes to constitute the illegitimate children heirs of their father.[319]

When a notary public testifies that a signature and a notary public seal on an affidavit are his, but that he cannot recall the details which occurred 24 years previously as to the execution of the affidavit by a man stating that he was the father of an illegitimate

315. FLA. STAT. § 394.70(1)(c) (Supp. 1974).

316. Fla. Laws 1974, ch. 74-142, *amending* FLA. STAT. §§ 710.02, 710.03(1)(c), 710.04(2), 710.05(7), & 710.07, (Supp. 1974).

317. Fla. Laws 1975, ch. 75-222, *amending* FLA. STAT. §§ 744.203, 744.312, 744.402, 744.501(2) (Supp. 1974).

318. Drucker v. Fernandez, 288 So. 2d 283 (Fla. 3d Dist. 1974).

319. *In re* Hill, 294 So. 2d 46 (Fla. 3d Dist. 1974).

child, nor can he testify that the man signing the affidavit was actually the man he appeared to be, and there is no testimony impeaching the signature of the affiant on the affidavit nor on a birth certificate containing the same name, this is sufficient evidence to support a finding that a father has acknowledged his illegitimate child in writing in the presence of a competent witness.[320]

The case of *Pinkney v. Pinkney*[321] which held that an illegitimate child has no cause of action against her father for the wrongful death of her mother and for having caused the daughter to be born illegitimate, has been overruled.[322] The court has further held that section 742.031 of the Florida Statutes may be construed as authorizing a court to grant the same custody rights in illegitimate children to the father as to the mother, and that, as so construed, is not unconstitutional. It is apparent that the court went out of its way to uphold the constitutionality of this section; it is submitted that the statute was intended to exclude the father of an illegitimate child which, of course, would have rendered it unconstitutional.

B. *Legislation*

The terms "illegitimate child," "bastard" and "bastardy" have been eliminated from the Florida Statutes, and the words "child born out of wedlock" have been substituted. Further, birth certificates will no longer make any reference to the legitimacy of children.[323]

XIII. MISCELLANEOUS

A. *Change of Names*

Under section 62.031 of the Florida Statutes, a married woman may have her birth name as her legal name during coverture "so long as the statistical data required by the statute is given, as well as a verification that the petition is not being filed for ulterior or illegal purposes nor will the change of name invade the property rights of others."[324]

320. Locke v. Campbell, 305 So. 2d 825 (Fla. 1st Dist. 1975).

321. 198 So. 2d 52 (Fla. 1st Dist. 1967).

322. Brown v. Bray, 300 So. 2d 668 (Fla. 1974).

323. Fla. Laws 1975, ch. 75-166, *amending* FLA. STAT. §§ 382.17, 382.21(1), (2), and (4), 382.35(2), (3), (4), and (7)(d), 742.011, 742.091, 742.10, 744.301(1), 856.04(2), and the title of ch. 742 (from "Bastardy" to "Determination of Paternity").

324. Marshall v. State, 301 So. 2d 477 (Fla. 1st Dist. 1974).

B. *Emancipation*

A parent will not be liable for the cost of hospital services rendered to his minor daughter when the facts show that she has been emancipated as the result of her leaving home and becoming completely self-supporting. A common law emancipation may occur as the result of the parties' actions even though there has not been any compliance with the statutory means of securing emancipation under section 62.011 of the Florida Statutes.[325]

C. *Torts*

Under maritime law, a spouse of a stevedore who is injured aboard ship may not recover for loss of consortium regardless of the sex of the stevedore.[326]

The District Court of Appeal, Fourth District, has, in light of its position as an intermediate appellate court, followed the interspousal tort immunity rule articulated by the Supreme Court of Florida.[327]

A wife does not have a cause of action against her husband or ex-husband for compensatory and punitive damages on the grounds that he induced her to marry him by false and fraudulent protestations of love, that he left her after days of marriage, and that he told her to leave the marital home, harassing and threatening her with physical injury.[328]

A father cannot maintain a derivative action against his unemancipated son and his insurance company for loss of services and medical expenses caused as a result of injuries incurred by another unemancipated son.[329]

A claim by a wife against her husband's paramour for invasion of her privacy by wrecking and destroying her marriage is, in reality, a suit for alienation of affections which is forbidden by section 771.01 of the Florida Statutes.[330]

In *De Guido v. De Guido*,[331] a wife who was a passenger in a car sued her husband for personal injuries allegedly suffered as a result

325. Ison v. Florida Sanitarium & Benevolent Ass'n, 302 So. 2d 200 (Fla. 4th Dist. 1974).

326. Davidson v. Schlussel Reederei KG, 295 So. 2d 700 (Fla. 2d Dist. 1974).

327. Heaton v. Heaton, 304 So. 2d 516 (Fla. 4th Dist. 1974), *following* Bencomo v. Bencomo, 200 So. 2d 171 (Fla.), *cert. denied*, 389 U.S. 970 (1967); Gasten v. Pittman, 224 So. 2d 326 (Fla. 1969); *accord*, Doyle v. Doyle, 307 So. 2d 862 (Fla. 4th Dist. 1975).

328. Mims v. Mims, 305 So. 2d 787 (Fla. 4th Dist. 1974).

329. Wright v. Farmers Reliance Ins. Co., 314 So. 2d 641 (Fla. 3d Dist. 1975).

330. De La Portilla v. De La Portilla, 287 So. 2d 345 (Fla. 3d Dist. 1973), *cert. denied* 295 So. 2d 304 (Fla. 1974).

331. 308 So. 2d 609 (Fla. 3d Dist. 1975).

of his negligent driving. Five months after filing his answer the defendant raised the defense of interspousal immunity for the first time and moved for a judgment on the pleadings. The trial court granted the motion, but the appellate court reversed and held that matters outside the pleadings cannot be raised by a motion for judgment on the pleadings. Further, unless the defendant can show that this defense was unavailable at the time of the filing of the answer, he cannot raise it now as it was waived.

In an action for wrongful death the defendant may not plead insanity as a defense when the claim is limited to compensatory damages; the result may, however, be different when punitive damages are also sought.[332]

In a case whose implications may be far reaching, the First District Court of Appeal has held that a municipality may be held liable for the negligence of its employees (primarily policemen) who, after repeatedly having answered complaints about a father's behavior, and having seen some of the injuries inflicted upon the children, failed to protect them from his abuse.[333]

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332. Jolley v. Powell, 299 So. 2d 647 (Fla. 2d Dist. 1974), *cert. denied* 309 So. 2d 7 (Fla. 1975).

333. Florida First Nat'l Bank v. City of Jacksonville, 310 So. 2d 19 (Fla. 1st Dist. 1975).